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No. 06-663

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below correctly held that respondent's action was not barred by a prior judgment when the facts and legal standards applicable in the prior proceeding were different than in the current action.

2. Whether the court below correctly held that a company with numerous and significant contacts with New Jersey is subject to personal jurisdiction in that State.

RULE 29.6 DISCLOSURE

Telcordia Technologies, Inc. is a non-governmental party. Telcordia is owned by TTI Holding Corporation I, which is owned by Telcordia Holdings, Inc., which is owned equally by Providence Equity Partners Inc. and Warburg Pincus LLC.

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This case does not present any question worthy of this Court's review. In rejecting Telkom's issue preclusion defense, the Third Circuit applied well-settled legal standards, under which the defense fails when (as here) the facts are materially different than they were in a prior proceeding. The estoppel issue is also not worthy of review because the issue no longer has any practical significance. After Telkom filed its Petition for Certiorari, the Supreme Court of Appeal of South Africa affirmed Telcordia's arbitration award—an occurrence that Telkom has repeatedly acknowledged eliminates its estoppel defense.

The Third Circuit's personal jurisdiction ruling similarly applied black letter law to the unique facts of this case, raising no novel or recurring issues for this Court to consider.

Furthermore, this case presents no inter-circuit conflict, because both the Third Circuit's decision and the decisions of other circuits cited by Telkom faithfully follow this Court's longstanding precedents on issue preclusion and personal jurisdiction. Telkom's contention that a conflict exists is based on a mischaracterization of the decision. The text of the Third Circuit's opinion lends no support to Telkom's claim that the court announced new and conflicting rules of law. The Court should deny the Petition for Certiorari.

STATEMENT OF THE CASE

A. Background

This case arises from a contract between Respondent Telcordia Technologies, Inc. (a Delaware corporation with its principal place of business in Piscataway, New Jersey) and Petitioner Telkom S.A. Ltd. (a South African corporation with its principal place of business in Pretoria, South Africa). The contract at issue required Telcordia to develop customized telecommunications software for

Telkom for use in the South African telephone system. (Pet. App. 2a.) Telcordia performed most of the work under the contract in New Jersey, including all software development and testing.

In the contract, the parties agreed to resolve disputes through final and binding arbitration governed by the International Chamber of Commerce ("ICC") Rules. The ICC Rules state that by submitting the dispute to arbitration, the parties agree that the arbitrator's award is binding, that the award will be enforced without delay, and that rights to judicial recourse are waived, insofar as waiver can validly be made. *ICC Rules of Arbitration*, art. 28(6).[1] Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, such an award can be judicially enforced in any of the 134 countries that are signatories to the Convention (including the United States). In the United States, enforcement proceeds under 9 U.S.C. § 207, which refers to an enforcement proceeding as one to "confirm" the award. Section 207 expressly requires U.S. courts to confirm arbitration awards unless they invoke one of the narrow grounds for refusal of enforcement (set forth in Article V of the New York Convention) or deferral of enforcement (set forth in Article VI of the New York Convention). 9 U.S.C. § 207.

B. The Arbitration

In late 2000, a dispute arose under the contract, and in March 2001, both parties terminated the contract for breach.

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[1] *See* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf ("Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.").

Telcordia initiated arbitration proceedings and filed a claim for approximately $130 million in damages. Telkom answered and counterclaimed for approximately $350 - $500 million in damages. The Arbitration Foundation of South Africa nominated Anthony Boswood, QC, a highly experienced English barrister, to preside over the arbitration. The ICC confirmed Mr. Boswood's nomination without objection by either party.

The arbitration commenced in Johannesburg in March 2001 and took eighteen months to complete. It included voluminous document productions, interrogatories, requests for admission, two pre-hearing conferences, motions, briefs on key issues, the exchange of twenty-two witness statements, the exchange of written opening statements, and a two-and-one-half week evidentiary hearing.

In August 2002, on the last day of closing arguments, Telkom claimed for the first time that there was a legal issue that required the intervention of a South African court in the arbitration. Telkom then attempted to expand that judicial intervention to encompass all issues placed before the arbitrator. The arbitrator rejected Telkom's eleventh-hour request and declined to refer the matter to the South African court.

On September 27, 2002, the arbitrator issued a sixty-four page award, holding that Telkom was liable to Telcordia for breach of contract. The ICC proceeded to formalize the liability award, pursuant to the parties' agreement that the arbitrator was free to decide any issue by way of partial or interim award. Following standard ICC procedures, the ICC's International Court of Arbitration formally issued a final liability award on September 30, 2002, and directed the parties to give it effect.

Rather than proceeding to the damages phase of the arbitration, however, Telkom launched a local judicial challenge to set aside the award in the South African trial

court. This parallel "set-aside" proceeding is discussed in Section D below.

C. The Proceedings In The District Of Columbia

Shortly after the ICC's International Court of Arbitration issued the final liability award, Telcordia petitioned the U.S. District Court for the District of Columbia to confirm the award, pursuant to 9 U.S.C. § 207 and the New York Convention. Telcordia maintained that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, provided for personal jurisdiction and venue in the D.C. District Court.[2] In July 2003, the D.C. District Court dismissed the petition without prejudice on grounds of lack of personal jurisdiction and alternatively under the doctrine of *forum non conveniens*. (*See* Pet. App. 43a.)

On appeal, the U.S. Court of Appeals for the D.C. Circuit refused to reach the district court's grounds for dismissal and affirmed on an alternate ground—that the district court could have properly dismissed the case, without prejudice, under Article VI of the New York Convention. (Pet. App. 43a-44a.) Article VI permits a district court to "adjourn" a decision on the enforcement of an arbitral award if there is a pending parallel judicial proceeding considering whether the award should be set aside. (Pet. App. 51a-52a.) The D.C. Circuit held that the district court could have properly dismissed the case without prejudice under Article VI, because there was a pending set-aside case in the South

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[2] At the time the D.C. action was filed, the Government of South Africa was the majority owner of Telkom. Telcordia maintained that this ownership interest rendered Telkom an instrumentality of a foreign state (*see* 28 U.S.C. § 1603(b)) subject to suit in the D.C. District Court. *See id.* §§ 1391(f)(4), 1603 (providing for venue in D.C. District Court for suit against foreign instrumentality); *id.* §§ 1330(b), 1603 (providing for personal jurisdiction in any district court for Foreign Sovereign Immunities Act claim against foreign instrumentality).

African trial court at the time of the district court's decision, and because Telkom had urged the D.C. District Court to "adjourn proceedings under Article VI pending the outcome" of those proceedings. (Pet. App. 43a-44a.)[3]

D. The South African Trial Court Decision

After the D.C. District Court dismissed Telcordia's petition, and while that dismissal was being appealed to the D.C. Circuit, the South African trial court issued a decision that set aside Telcordia's arbitration award. The decision was based on a wholesale relitigation of the case that took six weeks. In the decision, the South African court voided the ICC award, dismissed the arbitrator, terminated the ICC (which was the parties' contractually agreed-upon, independent governing arbitration body), ordered the parties to conduct an entirely new arbitration before three retired South African judges who had been designated by Telkom, and assessed all costs of the action against Telcordia.

E. The New Jersey District Court Proceeding

Because South African trial court's decision was highly irregular and did not bind the courts of the United States, Telcordia had a right to seek confirmation of its arbitral award in the United States. *See Chromalloy Aeroservices v.*

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[3] Once parallel set-aside proceedings have concluded, the Article VI "adjournment" procedure no longer applies, and the enforcing court proceeds under Article V of the New York Convention to consider confirmation of the award on the merits. (*See* Pet. App. 50a-51a.) By the time of the D.C. Circuit's decision, the South African set-aside proceedings were complete. *See infra* Section D. The D.C. Circuit nonetheless analyzed the case under Article VI, by basing its ruling on the record before the district court at the time of the district court's decision (at which point the set-aside proceedings were still pending). The D.C. Circuit concluded that on that record, it would have been proper for the district court to dismiss without prejudice under Article VI while awaiting the outcome of the parallel South African proceedings.

Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996). Given that the D.C. petition had been dismissed without prejudice, and that no court had previously considered whether Telcordia's award should be confirmed in light of the questionable South African set-aside decision, Telcordia filed a new petition to enforce the award, this time in the U.S. District Court for the District of New Jersey.

The New Jersey forum was chosen because the facts pertaining to personal jurisdiction had changed since Telcordia filed its initial petition in the District of Columbia. In 2004, Telkom had been privatized, and it therefore was no longer considered an "instrumentality" of the Government of South Africa subject to statutory personal jurisdiction under the Foreign Sovereign Immunities Act. Because personal jurisdiction under that Act was no longer possible, Telcordia now had to establish jurisdiction over Telkom in the same manner as any other private company. Accordingly, Telkom's contacts with a specific state—in this case, New Jersey—were now relevant. As the court below explained, "Telcordia offered *additional facts* in its current petition linking Telkom to New Jersey that were *not* analyzed by the D.C. District Court." (Pet. App. 9a (emphasis added).)

The parties' arguments also were entirely different in the New Jersey case than they had been in the D.C. case. In New Jersey, for the first time, the South African trial court decision was placed in the record for review by a United States court. The South African trial court decision was the primary focus of the parties' dispute in the New Jersey District Court. Telcordia argued, for the first time, that the South African decision was evidence of improper bias and "hometown justice"; that the South African court had denied Telcordia fundamental fairness; that the South African decision should not be accorded any deference by a United States court; and that the arbitration award should be confirmed notwithstanding the set-aside decision. Telkom

responded and defended the set-aside decision, arguing that Telcordia could not file a new petition unless and until the South African Supreme Court of Appeal "reinstated" Telcordia's award.

The New Jersey District Court dismissed the petition "with prejudice" on the basis of principles of issue preclusion or estoppel stemming from the D.C. Circuit's "without prejudice" dismissal. (Pet. App. 17a.) In the alternative, in a ruling the Third Circuit later characterized as "cryptic" (*see* Pet. App. 5a), the district court dismissed the petition "without prejudice" based on the New York Convention (Pet. App. 17a). Finally, the district court dismissed the petition for lack of personal jurisdiction. In so doing, the court followed the D.C. District Court's analysis on the issue of personal jurisdiction over Telkom, even though the D.C. District Court had not considered the question whether Telkom (as a private company) was subject to jurisdiction in New Jersey. (Pet. App. 25a-27a.)

F. The Third Circuit's Decision

A unanimous panel of the Third Circuit reversed the district court's order on two issues, but affirmed the dismissal without prejudice. The Third Circuit first held that Telkom is subject to personal jurisdiction in New Jersey based on its numerous and substantial contacts with the State relating to the parties' underlying contract. The Third Circuit's analysis of personal jurisdiction relied on longstanding principles of Due Process and well-established personal jurisdiction case law, including this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The court highlighted six significant connections between Telkom and New Jersey. (Pet. App. 8a.) The court also noted that Telkom should have anticipated being haled into New Jersey for an arbitral confirmation proceeding, but it emphasized that "the New York Convention *does not diminish the Due Process constraints* in asserting jurisdiction

over a nonresident alien." (Pet. App. 10a. (emphasis added).)

On the issue of estoppel, the Third Circuit held that the D.C. Circuit's judgment did not bar Telcordia's petition in New Jersey. The court explained that Telkom could not "piggyback a dismissal without prejudice into a dismissal with prejudice." (Pet. App. 11a.)

Although it held that Telcordia's petition was not barred by estoppel, the Third Circuit nonetheless affirmed the district court's dismissal of the petition without prejudice, applying the "wait-and-see" discretion permitted by Article VI of the New York Convention. The Third Circuit applied Article VI on the ground that the South African trial court's set-aside decision had been appealed and therefore had not been resolved with finality. Finally, the Third Circuit noted, in the interest of clarity, that "Telcordia can re-file when the Supreme Court of Appeal of South Africa has issued a judgment in the case." (Pet. App. 15a.)

G. The Decision Of The Supreme Court Of Appeal Of South Africa

On November 22, 2006 (after Telkom filed its Petition for Certiorari in this case), the Supreme Court of Appeal of South Africa ("SCA") reversed the South African trial court's set-aside decision in its entirety, thereby affirming Telcordia's arbitration award. *Telcordia Techs. Inc. v. Telkom SA* [2006] 139 SCA (RSA) (Opp'n App. 1a-85a). In a decision joined by all five justices on the panel, South Africa's highest appellate court characterized the South African trial court's actions as "a judicial snipe hunt." (Opp'n App. 49a ¶ 94.) The SCA wholly rejected Telkom's contentions that the arbitration was marred by "gross irregularities," or that the arbitrator had somehow misconceived or improperly carried out his duties. (Opp'n App. 50a ¶ 97 ("How it can be said, in these circumstances, that the arbitrator had committed a gross irregularity is

incomprehensible."); Opp'n App. 51a-52a ¶ 99 ("If one considers the length of the proceedings, the arbitrator's active involvement in defining and refining the issues, and the detailed and reasoned award, it was as presumptuous as it was fallacious for the court to have held that the arbitrator did not apply his mind properly to the issues at hand.").) Moreover, even though the basis of the set-aside decision was that the arbitrator had "misconceived the nature of the inquiry," the SCA held that there was "*nothing* to justify the conclusion that the arbitrator misconceived the nature of the inquiry" (Opp'n App. 63a-64a ¶ 129 (emphasis added)), and that "[i]t was not the arbitrator who misconceived the issue; it was, with respect, the court" (Opp'n App. 55a ¶ 108).

Telkom responded to the SCA's decision by initiating a collateral attack on a minor aspect of the decision in a different South African appellate court (the Constitutional Court). But the current state of the law in South Africa is that the trial court's decision is a nullity, and therefore Telcordia's arbitration award is valid and fully enforceable.

REASONS FOR DENYING THE PETITION

I. REVIEW IS NOT WARRANTED BECAUSE THE THIRD CIRCUIT'S ESTOPPEL HOLDING DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS

The Third Circuit's decision is consistent with well-settled principles of law set forth by this Court and the other regional circuit courts. Specifically, the Third Circuit held that Telcordia's New Jersey confirmation action was not precluded by the D.C. Circuit judgment, on a record in which the facts and legal issues before the New Jersey District Court were distinct from those argued before and decided by the D.C. Circuit. The Third Circuit's holding stands for the often-cited and unremarkable proposition that issue preclusion is inapplicable when the second action involves a *different* issue than the first action. *See, e.g., Comm'r v. Sunnen*, 333 U.S. 591, 599-600 (1948) (holding that issue preclusion "must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged" (emphasis added)).

Because it relies on a well-settled principle of law, the Third Circuit's decision does not conflict with any of the cases cited in Telkom's petition. All of those cases explain that issue preclusion applies only when the second action involves an issue that is *identical* to the first action. All of the cases cited by Telkom also explain that issue preclusion does not apply when the precise issue presented in the second action was not litigated in the previous action.

Furthermore, Telkom's attempt to assert a circuit conflict is based on a misreading of the Third Circuit's holding. Telkom ignores the bulk of the Third Circuit's substantive

analysis of estoppel, and instead relies on selective quotations taken out of context in arguing that the Third Circuit crafted a "new rule" that non-merits rulings lack preclusive effect. No reasonable interpretation of the Third Circuit's decision supports Telkom's strained reading. In fact, the Third Circuit cited with approval case law that directly contradicts the proposition that non-merits decisions lack preclusive effect.

A. The Third Circuit Decision Follows The Well-Established Rule That A Prior Judgment Has No Preclusive Effect If There Has Been A Change In Material Facts

In accordance with well-established legal principles consistently applied by this Court and the lower courts, the Third Circuit held that Telcordia's New Jersey confirmation action was not barred by issue preclusion stemming from the previous D.C. Circuit judgment. The underlying basis for the Third Circuit's holding—which Telkom completely ignores—was simple: issue preclusion did not bar Telcordia's New Jersey confirmation action because an entirely *different issue* was presented to the New Jersey District Court than that which was argued before and decided by the D.C. Circuit. Under black letter law, the requisite conditions for issue preclusion simply were not present.

1. Estoppel Applies Only When The Facts And Applicable Legal Standards In A Second Action Are Identical

This Court has repeatedly explained that issue preclusion (or collateral estoppel) applies only when several criteria are met, including (1) the prior action involved an "identical" issue and (2) the party against whom estoppel is asserted had a "full and fair opportunity to litigate" the issue in the earlier proceeding. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 327 n.5, 332-33 (1979) (explaining that collateral estoppel protects "litigants from the burden of

relitigating an *identical* issue" and applies only when a party "received a full and fair opportunity to litigate" the issue in a prior action (emphasis added and quotations omitted)).

As to the first requirement, this Court has cautioned against the application of estoppel principles when a second action involves an issue that is not "identical in all respects" to the issue in the prior action. *Sunnen*, 333 U.S. at 599-600 (holding that issue preclusion "must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged" (emphasis added)); *see also Montana v. United States*, 440 U.S. 147, 162 (1979) (explaining that "litigation [over] the identical question" is barred by collateral estoppel when "the factual and legal context in which the issues [arose] has not materially altered").

Allen v. McCurry, 449 U.S. 90 (1980), illustrates the second requirement. The Court explained that "one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel *cannot apply* when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case." *Id.* at 95 (emphasis added and quotations omitted); *see also Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (explaining that "the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard").

2. The Third Circuit Correctly Rejected Issue Preclusion On A Record In Which The Facts And Legal Standards Were Different Than Those Before The D.C. Circuit

In this action, the New Jersey District Court was faced with an entirely different issue than that argued before, and

decided by, the D.C. Circuit. As a result, the Third Circuit applied well-established doctrine and correctly held that Telcordia's petition was not barred by issue preclusion.

The distinct issue presented to the New Jersey District Court was whether to confirm Telcordia's arbitral award in light of the South African trial court's decision setting aside that award. In New Jersey, for the first time, a United States court was able to review the decision of the South African trial court. In New Jersey, for the first time, the parties were given an opportunity to litigate the impact of that decision on Telcordia's right to confirmation under the New York Convention.

Before the New Jersey District Court Telcordia argued—with the support of two internationally renowned experts in arbitration—that the South African set-aside decision was actually evidence *favoring* confirmation of the award by a United States court. Telcordia maintained that the set-aside decision contained evidence of improper bias or "hometown justice"; that the South African decision showed that the local court had denied Telcordia fundamental fairness; that the South African decision should not be accorded any deference by a United States court; and that a United States court could, and should, confirm Telcordia's award notwithstanding the South African trial court decision. In response, Telkom proffered two experts of its own who argued that the decision of the South African trial court was proper, and was entitled to deference.

In sum, all of the parties' arguments in the New Jersey District Court focused on the South African set-aside decision and its import in a United States confirmation action. These same arguments and this identical issue were not and *could not* have been argued or decided in the previous proceedings in the D.C. District Court. When Telcordia filed its confirmation action in the District of Columbia, the issue before the D.C. District Court was

whether to confirm Telcordia's award given that a *pending action* to set aside the award was *ongoing* in South Africa. The parties did not litigate the impact any set-aside decision had on Telcordia's confirmation right for the simple reason that *no set-aside decision existed at that time*.

Furthermore, when the D.C. Circuit reviewed the case on appeal, it did so on the record before the district court at the time it made its decision. The D.C. Circuit held that *on that record*, it would have been proper for the district court to have "adjourned" proceedings under Article VI of the New York Convention—by dismissing without prejudice until the South African court ruled in the parallel proceedings. The D.C. Circuit acknowledged the existence of the set-aside decision (which was issued while the case was on appeal in D.C.), but the D.C. Circuit did not consider the impact of the set-aside decision on Telcordia's right to confirmation because: (1) the decision was not in the record to be reviewed by the D.C. Circuit, and (2) the issue was never briefed or argued by the parties.[4]

Given the obvious differences between the issues in the D.C. proceedings and the issue presented in Telcordia's New Jersey action, the Third Circuit's holding that estoppel did not apply is wholly unremarkable.

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[4] During the oral argument in the D.C. Circuit, counsel did inform the court that the set-aside decision had been issued. Telkom argued (unsuccessfully) in the proceedings below that informing the court about the decision somehow meant that its effects on confirmation were argued before the D.C. Circuit. Telkom's argument was based on transcript snippets taken out of context. Telkom cannot credibly contend that Telcordia had a "full and fair opportunity" to litigate the issue before the D.C. Circuit.

3. The Third Circuit's Decision Is Consistent With Prior Case Law Holding That A Prior Judgment Lacks Preclusive Effect If There Has Been A Change In Material Facts

Because the Third Circuit's decision stands for the uncontroversial proposition that a prior judgment lacks preclusive effect if there is a change in material facts, the decision does not establish any new rule of law. The decision also does not conflict with any of the decisions cited in Telkom's petition. All of those decisions recognized and applied the same legal principles recognized and applied by the Third Circuit.

In every single one of the circuit court decisions cited by Telkom in which issue preclusion barred a subsequent action, the second suit involved *identical* facts and *identical* legal standards as the first suit. All of these decisions also recognize that issue preclusion does not apply where, as here, material facts have changed. *See Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987) (explaining that "[t]he present complaint makes *precisely the same* statement of this claim as the previous complaint" (emphasis added)); *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (holding that "[plaintiff] is precluded from relitigating *the very question* which was litigated in the prior action" (emphasis added) (quoting *Restatement of Judgments* § 49 cmt. b (1942))); *Grieve v. Tamerin*, 269 F.3d 149, 153-54 (2d Cir. 2001) (holding party was precluded from asserting the *very same* Hague Convention claim in a second action when in the first action the court had abstained under the *Younger* doctrine); *Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 829-30 (5th Cir. 2006) (holding that "collateral estoppel applies when a previously litigated issue of law or fact was *identical* to the present issue, actually litigated, necessary to a final

judgment, and reviewed under the same standard as the present issue" (emphasis added)); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir. 1977) (holding that appellants were precluded from bringing suit for third time "citing the *same* jurisdictional basis" as previous actions that had been dismissed for lack of jurisdiction (emphasis added)); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) (holding that appellant was precluded from relitigating same standing issue he had raised previously where new factual allegations in complaint "did not represent a change in circumstances"); *Park Lake Res. LLC v. U.S. Dep't of Agriculture*, 378 F.3d 1132, 1137-38 (10th Cir. 2004) (holding issue preclusion barred suit because the "same issue" had been decided in prior action "on the same available facts"); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999) (dismissing case on basis of issue preclusion where previous suit had been dismissed for insufficient jurisdictional amount because new complaint failed to show any change in circumstances); *Goldsmith v. Mayor & City Council of Baltimore*, 987 F.2d 1064, 1068-69 (4th Cir. 1993) (holding that the court "must determine *precisely* what issues the court decided" in the prior action, and holding that certain claims were not barred because they had not been "previously litigated" (emphasis added)); *United States v. Dean*, 752 F.2d 535, 541 n.14 (11th Cir. 1985) (explaining that a prior decision only has *res judicata* effect "as to issues that were actually decided," and holding there was no estoppel because the court could not determine the exact basis of the prior judgment); *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112-13 (8th Cir. 1999) (reversing dismissal based on issue preclusion because issue in previous case was "*not* identical" to current issue (emphasis in original)).

B. The Third Circuit Did Not Announce A New Rule That Non-Merits Dismissals Lack Preclusive Effect

Telkom also has no basis for asserting that that the Third Circuit announced a "sweeping" new "general rule"—in conflict with the law of other circuits—that non-merits dismissals lack preclusive effect. (Pet. 10-11.) Telkom invents this alleged new rule out of whole cloth, by misconstruing a single paragraph of the Third Circuit's decision. That paragraph contrasts dismissal of a case, with prejudice, on the merits (under Article V of the New York Convention) with the dismissal of a case without prejudice, under Article VI of the New York Convention, to defer to a parallel foreign proceeding. (Pet. 12-13 (citing Pet. App. 12a).) In this discussion, the Third Circuit makes the unremarkable point that a non-merits dismissal (without prejudice) under Article VI permits further court proceedings at a later time, whereas a merits dismissal under Article V (with prejudice) does not. (Pet. App. 12a.) There can be no serious dispute on this point. The D.C. Circuit and the Third Circuit both agreed that when a court "adjourns" under Article VI, it can either "stay or dismiss without prejudice." (Pet. App. 12a, 44a.) It necessarily follows that when a district court decides that the parallel foreign proceedings are sufficiently complete, the "adjournment" can end, and proceedings before the district court can continue, either through the lifting of a stay or the filing a new case following dismissal without prejudice. That is why the federal statute implementing the New York Convention refers to an Article VI adjournment as a "*deferral* of recognition or enforcement." 9 U.S.C. § 207 (emphasis added). That is also why the Third Circuit described the "raison d'être of Article VI" as "wait-and-see." (Pet. App. 11a.)

By adjourning under Article VI, a court instructs the

parties to "wait-and-see," and then resume proceedings once the parallel foreign proceedings are sufficiently complete. The Third Circuit properly ruled that to hold that an Article VI adjournment *bars* later proceedings—as the New Jersey District Court did—would have the outrageous and untenable effect of converting a dismissal without prejudice into a dismissal with prejudice. (Pet. App. 11a ("For Telkom to be able to piggyback a dismissal without prejudice into a dismissal with prejudice is anathema to the 'wait-and-see' raison d'être of Article VI.").)

The Third Circuit's brief commentary on Article VI described above therefore addresses issue preclusion in a very specific context, in which a non-merits dismissal occurs in U.S. district court, the facts then change (through developments in the foreign parallel proceeding), and the parties later return to U.S. district court for consideration of the changed circumstances. This commentary in no way presents a conflict with the decisions of other circuits, cited by Telkom, in which relitigation of non-merits rulings was precluded because there were *no* changed circumstances. *See supra* Part I.A.3.

Indeed, there can be little doubt that the Third Circuit would find issue preclusion in a different case, if a party tried to relitigate the identical factual and legal issues resolved in a prior non-merits ruling. The Third Circuit cited with approval its earlier decision in *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977), in which the court held that a non-merits dismissal (on *forum non conveniens* grounds) precluded later relitigation of the same issue on the same facts. (Pet. App. 12a n.8.) However, the Third Circuit distinguished *Pastewka* from the present case, in which the issue is whether new court proceedings can be instituted "once a set of events have passed" in the foreign parallel proceeding. (Pet. App. 12a n.8.) The Third Circuit held that under those circumstances, the new court proceedings are not

precluded, and Telkom cannot point to any conflicting decision from another circuit holding otherwise.

II. REVIEW OF THE ESTOPPEL ISSUE IS NOT WARRANTED BECAUSE THE ISSUE IS NO LONGER PRESENTED BY THIS CASE

The Court also should not grant review of the estoppel issue, because it is an issue no longer presented by this case. The Court should take judicial notice of the (attached) recent decision of the Supreme Court of Appeal of South Africa ("SCA") that was decided after the Petition for Certiorari was filed. (Opp'n App. 1a-85a.) The SCA's decision emphatically affirmed the validity of Telcordia's arbitration award and immediately nullified the set-aside decision of the South African trial court. (Opp'n App. 55a ¶ 108 (reversing trial court decision in its entirety and explaining "[i]t was not the arbitrator who misconceived the issue; it was, with respect, the court").) As a practical matter, the SCA's decision removes the estoppel issue from this case, because Telkom has repeatedly conceded that Telcordia would not be estopped from returning to U.S. district court to enforce an arbitration award deemed valid by the South African courts. This Court should not waste its resources granting review on an estoppel issue that has resolved itself already through the ruling of the SCA.

Under Telkom's own argument, the SCA decision removed any preclusive effect of the D.C. Circuit judgment. Telkom's Third Circuit brief acknowledged Telcordia's undisputed right to file this action following a reversal by the SCA: "Telcordia may file a new enforcement action in the U.S. *if the award is reinstated in the South African appeal.*" (Pet. 19 n.7 (emphasis added).) Telkom's Petition for Certiorari similarly argues that, under the D.C. Circuit's judgment, Telcordia "might bring a new petition to confirm the award *if the award were reinstated.*" (Pet. 2 (emphasis added); *see also* Pet. 7 (arguing that the D.C. Circuit

dismissed the action "so that Telcordia might refile if the South African courts reinstated the award"); Pet. 16-17 (arguing that the necessary "set of events" for "relitigation" is "Telcordia's continuing efforts to reinstate the award through its South African appeal," and that such reinstatement is a "precondition to suit").)[5]

Since Telkom's own arguments confirm that Telcordia is not currently estopped from seeking judicial confirmation of its award, there is no basis for granting review of the estoppel issue. There is absolutely no reason for this Court to grant certiorari on an issue that is no longer presented in the case.[6]

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[5] Furthermore, the SCA's decision also means that the Third Circuit's decision authorizes a new action by Telcordia. The Third Circuit's affirmance of the dismissal without prejudice explicitly recognized that Telcordia could file a new action after the SCA ruled: "Telcordia can re-file when the Supreme Court of Appeal of South Africa has issued a judgment in the case." (Pet. App. 15a.)

[6] This conclusion is not changed by the fact that Telkom has filed an eleventh-hour collateral attack on a minor aspect of the SCA's decision. *See supra* Section G. The current state of the law in South Africa is that the trial court's decision is a nullity, and Telcordia's award is valid and fully enforceable. This Court should not grant review on the estoppel issue based on speculation that the collateral attack on the SCA decision could revive the estoppel issue as a live controversy in this case.

It is worth noting that the SCA's decision warrants denying review of the estoppel issue even if, as a technical matter, the issue is not moot, given the pendency of the collateral attack on the SCA's decision in South Africa. Regardless of whether the issue is moot, this Court should not, as a discretionary matter, grant review on an issue that is currently gone from the case, based on speculation that the issue could return to the case in the future. Of course, putting aside any potential or actual mootness, the estoppel issue does not warrant review in any event because the Third Circuit's holding is consistent with well-established principles of law. *See supra* Part I.

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III. THE THIRD CIRCUIT'S DECISION ON PERSONAL JURISDICTION DOES NOT WARRANT REVIEW

The Third Circuit correctly held that Telkom is subject to suit in New Jersey based on Telkom's numerous and extensive contacts with that State, including six specific contacts highlighted by the court as particularly relevant. The Third Circuit relied on well-established principles of Due Process, as interpreted and explained by this Court, in determining that Telkom had sufficient "minimum contacts" with New Jersey that asserting jurisdiction over it complies with "traditional notions of fair play and substantial justice." (Pet. App. 7a (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotations omitted)).)

The Third Circuit did not create a "special Due Process standard for arbitral award enforcement cases." (Pet. 20.) To the contrary, the Third Circuit explicitly rejected the proposition that Due Process requirements are any different in an arbitral confirmation action than in any other case.

Nor did the Third Circuit create a unique "Third Circuit standard" for deciding personal jurisdiction issues. (Pet. 26.) Rather, the court merely clarified a fundamental point that the New Jersey District Court failed to appreciate in its jurisdictional analysis—that there is an important analytical difference between: (1) the D.C. District Court's analysis of

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At this juncture, the only issue remaining for the Court to consider is whether the personal jurisdiction question—which plainly is not moot—warrants review. *Cf. Powell v. McCormack*, 395 U.S. 486, 496-97 (1969) (explaining that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy"). As set forth below, the personal jurisdiction question presented is routine and unremarkable and does not justify issuance of a writ of certiorari.

whether Telkom, as a *foreign instrumentality*, was subject to suit *in the United States*; and (2) the New Jersey District Court's analysis of whether Telkom, as a *private company*, is subject to suit *in New Jersey*.[7]

A. Applying The Traditional Test For Personal Jurisdiction, The Third Circuit Correctly Held That Telkom Is Subject To Suit In New Jersey

In a decision inextricably bound to the specific facts of this case, the court below held that Telkom is subject to jurisdiction in New Jersey based on its numerous and significant contacts with that State. The court cited well-established law interpreting the Constitution's Due Process Clause, including several of this Court's seminal decisions on personal jurisdiction.

The Third Circuit recited and applied this Court's well-established framework for analyzing personal jurisdiction, as set forth in *International Shoe*, 326 U.S. 310, and its progeny. Under this test, the requirements of the Due Process Clause are satisfied when the nonresident defendant

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[7] As explained *supra*, between the time Telcordia filed the action in D.C. and the time it filed in New Jersey, the South African Government divested its majority ownership of Telkom. When Telcordia filed in New Jersey, Telkom was no longer considered an "instrumentality" of a foreign state under the Foreign Sovereign Immunities Act. The legal standards governing personal jurisdiction and venue that Telcordia had relied on to bring the first petition in D.C. were no longer relevant. In New Jersey, unlike in D.C., Telcordia had to establish jurisdiction over Telkom in the same manner as any other private company. In New Jersey, unlike in D.C., Telkom's contacts with a specific state were critical to the court's jurisdictional analysis. The court below therefore recognized that the change in Telkom's ownership distinguished the jurisdictional analysis from that of the D.C. court. (Pet. App. 9a ("Telcordia offered additional facts in its current petition linking Telkom to New Jersey that were not analyzed by the D.C. District Court.").)

has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316.

The Third Circuit first determined that Telkom had more than sufficient "minimum contacts" with New Jersey. Specifically, the Third Circuit highlighted the following six connections between Telkom and New Jersey:

> (1) Telkom entered into a long-term, quarter-billion dollar contract with a New Jersey company;
>
> (2) significant activities related to the contract were performed in New Jersey;
>
> (3) Telkom visited New Jersey on numerous occasions in connection with the contract;
>
> (4) Telkom communicated with Telcordia's New Jersey office extensively;
>
> (5) Telkom paid Telcordia via a New Jersey bank [; and]
>
> (6) Telkom breached the contract by failing to make payments to said New Jersey bank.

(Pet. App. 8a.)

In accordance with this Court's precedents, the Third Circuit noted that it must consider "the totality of the circumstances" in deciding the jurisdictional question. (Pet. App. 11a.) Beyond reciting the specific contacts listed above, the Third Circuit emphasized several aspects of the parties' relationship and Telkom's contacts with New Jersey. For example, the court noted that the underlying contract involved "customized merchandise" and was not simply "the isolated interaction of a supplier putting an item into the stream of commerce." (Pet. App. 9a.) The Third Circuit

also concluded that a "significant part of the business relationship" had taken place in New Jersey. (Pet. App. 10a.) The court correctly held that, viewed as a whole, these contacts demonstrated "purposeful availment" of the New Jersey forum. (Pet. App. 10a.)

Simply put, the Third Circuit's holding is entirely consistent with numerous decisions of this Court. *See Burger King*, 471 U.S. 462 (holding that personal jurisdiction could be asserted over a non-resident defendant where the defendant negotiated a long-term contract with a forum corporation, significant activities related to the contract were performed in the forum, the defendant communicated by mail and telephone to the forum, defendant made payments to the plaintiff in the forum, and the defendant breached the contract by failing to pay the plaintiff in the forum); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (explaining that the issuance of negotiable debt instruments denominated in United States dollars payable in the forum state was highly relevant to finding personal jurisdiction over a foreign defendant); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (holding that a single contract with a forum state resident entered into by mail met the minimum contacts test because the single transaction created a substantial connection with the forum state).[8]

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[8] There is no basis for Telkom's argument that the Third Circuit "disregarded the principles of *Asahi Metal*" in holding that Telkom, a foreign entity, is subject to jurisdiction in New Jersey. (Pet. at 26.) In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987), the foreign defendant's attenuated connection to the forum state (California) was limited to the mere "placement of a product into the stream of commerce" that later ended up in California. Here, Telkom's numerous and direct contacts with New Jersey, including a quarter-billion dollar contract with a New Jersey resident, are much more extensive. *See supra* Part III.A. Indeed, the Third Circuit specifically

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B. The Third Circuit Did Not Announce A New Rule For Analyzing Personal Jurisdiction

The court below did not create a "new" or "special" rule for establishing personal jurisdiction in international arbitration confirmation proceedings. In fact the decision directly refutes such a rule. The decision is consistent with prior case law analyzing personal jurisdiction in the context of an arbitration confirmation action.

The court also did not craft a unique "Third Circuit standard" for interpreting Due Process requirements. Telkom's argument to the contrary is based on a mischaracterization of the court's analysis.

1. The Third Circuit Did Not Create A "Special" Standard For Analyzing Jurisdiction In International Arbitration Confirmation Proceedings

The Third Circuit did not announce a new rule for establishing jurisdiction in the context of an international arbitration enforcement action. Rather, the court applied the traditional test for jurisdiction within the specific facts of this case. That this case is an arbitration confirmation proceeding, as opposed to a routine commercial dispute, was just one of the many specific facts cited by the court. It was

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noted that the parties' contract required "customized merchandise" and thus "did not constitute the isolated interaction of a supplier putting an item into the stream of commerce to be fished out by a consumer." (Pet. App. 9.) Furthermore, in *Asahi Metals* the Court emphasized that California's interest in adjudicating the dispute was "slight," because the plaintiff was not a forum resident. 480 U.S. at 114. Here, applying the same rationale with the opposite result, the Third Circuit emphasized "New Jersey's interest in adjudicating this dispute" involving a New Jersey resident. (Pet. App. 10a.)

by no means determinative.

In fact, the Third Circuit explicitly *rejected* the notion that it could apply a "special, relaxed standard" (Pet. 21) of Due Process within the context of arbitral confirmation actions. The court stated: "*the New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien.*" (Pet. App. 10a (emphasis added).) Telkom's suggestion that the decision stands for the exact opposite principle is ridiculous.

The Third Circuit appropriately acknowledged the nature of this proceeding (*i.e.*, that this is an arbitral confirmation action) because that factor is relevant to the traditional personal jurisdiction analysis. This Court's decisions dictate that a nonresident defendant must "reasonably anticipate being haled into" the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). As the Third Circuit explained, not only did Telkom have numerous contacts with New Jersey, but also Telkom should have expected that Telcordia, a New Jersey resident, would seek confirmation of an arbitration award in New Jersey. (Pet. App. 7a-11a.)

Considering the nature of the proceeding as one of the mix of factors does not constitute formulation of a new "special, relaxed standard of minimum contacts." (Pet. 21.) To the contrary, the decision below applies long-settled principles of minimum contacts in a particular factual context, raising no issue worthy of this Court's review.[9]

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[9] The Third Circuit did not suggest otherwise when it referred to the "lens of Third Circuit law." (Pet. App. 9a.) In that statement, the Third Circuit was clarifying the fact—missed by the New Jersey District Court—that the personal jurisdiction analysis in this New Jersey action is *not* identical to the personal jurisdiction analysis in the prior D.C. proceedings. (Pet. App. 9a.) That is because, among other things, the D.C. District Court was plainly *not* analyzing whether Telkom, as a private company, was subject to jurisdiction in the State of New Jersey.

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2. The Third Circuit's Analysis Is Consistent With Prior Decisions Involving Confirmation Of Foreign Arbitral Awards

The Third Circuit's decision is consistent with the New York Convention case law cited by Telkom. None of those cases involved a non-resident defendant with substantial and extensive contacts with the relevant forum State. Certainly none of those cases involved the same six factors cited by the Third Circuit as critical to its jurisdictional analysis.

For example, the Ninth Circuit's analysis in *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), is easily distinguishable from this case, because—unlike here—the defendant's contacts with the forum state in that action were virtually nonexistent. In *Glencore Grain*, a Netherlands corporation filed a confirmation action in California, seeking to enforce a London arbitral award won against an Indian company. *Id.* at 1119. Unlike this case, (1) the plaintiff was not a resident of the forum in which it filed suit (thus the forum's interest in adjudicating the dispute was lessened); (2) there was no showing that significant portions of the underlying contract were performed in the forum state; (3) the defendant did not make payments to the forum state; and (4) the defendant did not breach the underlying contract by failing to make payments into the forum state. *Id.* at 1123-25.

The other arbitral confirmation cases cited by Telkom in which courts refused to assert jurisdiction over foreign

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Of course—unlike the New Jersey District Court—the D.C. District Court had no reason to (and did not) focus on "the specific contacts between Telkom and New Jersey." (Pet. App. 9a.) Thus, the decision below did not apply or announce any unique "Third Circuit standard" for determining personal jurisdiction issues. (Pet. 26.)

defendants are similarly distinguishable. *See Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 211, 214-15 (4th Cir. 2002) (finding no personal jurisdiction over defendant where a Channel Island corporation sought confirmation of Moscow arbitral award against a Russian corporation in Maryland, when business dealings occurred abroad, dispute involved performance abroad, and the Russian company's few contacts with the forum did not relate to the dispute); *Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 26 (S.D.N.Y. 1985) (finding no personal jurisdiction over defendant in New York where a Liberian corporation sought confirmation of London arbitral award against a Panamanian corporation with a principal place of business in Greece when business dealings occurred abroad, dispute involved performance abroad, and the Panamanian corporation had no contacts with New York); *Creighton Ltd. v. Qatar*, 181 F.3d 118, 120, 127-28 (D.C. Cir. 1999) (finding no jurisdiction over defendant where a Cayman Islands corporation based in Tennessee sought confirmation of a Paris arbitral award against the government of Qatar in the District of Columbia when contract was offered, accepted, and performed in Qatar, payment was made in Qatari currency to a bank account in Qatar, and the alleged breach occurred in Qatar).[10]

Accordingly, the decision below does not create a conflict among the lower federal courts, and review by this Court is not warranted.

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[10] The other circuit-level New York Convention cases cited by Telkom are also not in conflict. In *Dardana Ltd. v. A.O. Yuganskneftegaz*, the court simply remanded for jurisdictional discovery. 317 F.3d 202, 208-09 (2d Cir. 2003). In *TMR Energy Ltd. v. State Property Fund of Ukraine*, the D.C. Circuit did not even reach the issue of minimum contacts or Due Process because it held that the defendant, a foreign "instrumentality," was not a "person" within the meaning of the Fifth Amendment. 411 F.3d 296, 305 (D.C. Cir. 2005).

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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January 16, 2007

APPENDIX

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case number: 26/05
Reportable

In the matter between:

TELCORDIA TECHNOLOGIES INC	APPELLANT
and	
TELKOM SA LTD	RESPONDENT
CORAM :	HARMS, CONRADIE, CLOETE, LEWIS AND PONNAN JJA
HEARD:	30 & 31 OCTOBER 2006
DELIVERED:	22 NOVEMBER 2006
Summary:	Arbitration - review of award - grounds for setting aside
Neutral Citation:	This judgment may be referred to as *Telcordia Technologies Inc v Telkom SA* [2006] 139 SCA (RSA).
Order:	The court order appears at para 158.

JUDGMENT

HARMS JA:

A. Introduction

[1] This appeal relates to the review of consensual international commercial arbitration proceedings. The review is under s 33(1) of the Arbitration Act 42 of 1965. The court below, per de Villiers J, upheld an application brought by Telkom SA Ltd for the review of an arbitral award. It set aside an interim award (which was final in effect) in favour of the appellant, Telcordia Technologies Inc, a Delaware corporation. The arbitrator was Mr Anthony Boswood QC, a London barrister. Telkom is a local company and is the present respondent. The high court not only set aside the award; in addition it removed the arbitrator and appointed three new arbitrators, retired South African judges, in his stead.

[2] In spite of the fact that the argument before the high court lasted six weeks, and the hearing of the application for leave to appeal another three days, the court dismissed the latter application out of hand. This Court, on petition, granted the necessary leave. We uphold the appeal for the reasons that follow but because of the nature of the submissions this judgment contains some repetition.

[3] The high court in essence held that the arbitrator had committed gross irregularities in the proceedings in the course of interpreting a contract between the parties. The alleged irregularities related in summary to the nature of the evidence that the arbitrator took into account; and whether he had failed to appreciate the import of South African law in relation to both contractual interpretation and to the amendment of written contracts. Matters not decided below but raised as grounds of review were, broadly, whether the arbitrator had exceeded the bounds of the terms of reference; whether he had made findings without evidence; whether he had failed to give Telkom the opportunity to lead further

evidence; and whether he had erred in refusing to state a case for an opinion by the court in terms of s 20 of the Act.

[4] The high court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings[1] and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century.[2] This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, 'dictates a high degree of deference for decisions . . . for awards of consensual arbitration tribunals in particular.'[3] And the 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes'[4] have given rise in other jurisdictions to the adoption of 'a standard which seeks to preserve the autonomy of the forum selected by the parties and to

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[1] See the article series by RH Christie beginning with 'Arbitration: Party Autonomy or Curial Intervention: The Historical Background' (1994) 111 *SALJ* 143. *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZR 669.

[2] *Eg Dutch* Reformed *Church v Town Council of Cape Town* (1898) 15 SC 14 at 21; *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174; *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A). The Roman Dutch approach mentioned in *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A) is of historical interest only.

[3] *United Mexican States v Feldman Karpa* 2005 CanLII 249 (ON CA) para 37. For the current English approach: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43. The New Zealand approach is set out in *Trustees of Rotoalra Trust v Attorney-General* [1998] 3 NZLR 89 (HC) at 101-102.

[4] *Mitsubishi Motors Corporation v Solar Chrysler-Plymouth Inc* 473 50 US 614 (1986) per Blackmum J at 629.

minimize judicial intervention when reviewing international commercial arbitral awards.'[5]

[5] Blackmum J made these pointed remarks in this regard:[6]

> 'As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration", *Kulukundis Shipping Co v Amtorg Trading Corp* 126 F2D 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.'

[6] The structure of the remainder of this judgment is as follows:

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[5] *Re The International Commercial Arbitration Act SBC (Quintette Coal Ltd v Nippon Steel Corp)* 1986, C. 14, 1990 CanLII 304 (BC SC) quoted in *United Mexican States* at para 36. A special deference approach does not arise on the facts of this case. It should be noted that South Africa has not adopted the 1985 UNCITRAL Model Law, which strictly limits the involvement of courts in the arbitral process.

[6] *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc supra.*

B. The arbitration clause (para 7-10).

C. The non-variation clause (para 11-13).

D. The structure of the Integrated Agreement and Telcordia's delivery obligations (para 14-22).

E. The dispute (para 23-24).

F. Telcordia's claims (para 25-27).

G. The second amendment (para 28).

H. The May issues (para 29-30).

I. The arbitrator's award (para (31).

J. The grounds for review (para 32-43).

K. The relationship between the Constitution and the Arbitration Act (para 44-51).

L. The meaning of s 33(1)(b): 'gross irregularity' and 'exceeding powers' (para 52-79).

M. The nature of the inquiry, the duties of the arbitrator, and the scope of his powers (para 80-89).

N. How did the arbitrator understand his duties? (para 90-93).

O. The findings by the high court relating to the arbitrator's misconceptions about his duties, and exceeding his powers (para 94-101).

P. The primary question and the *Shifren* doctrine (para 102-116).

Q. The sign-off requirement (para 117-122).

R. The disclaimers (para 123-126).

S. Testing for compliance (para 127-131).

T. The London agreement (para 132-142).

U. The section 20 issue (para 143-156).

V. Conclusion (para 157).

W. The order (para 158).

Repudiation is dealt with in the accompanying judgment of Cloete JA.

B. <u>The Arbitration Clause</u>

[7] The agreement which formed the subject matter of the arbitration is known as the Integrated Agreement and was concluded on 24 June 1999. It contained an arbitration clause which was independent of the validity of the Integrated Agreement. The clause provided that 'all disputes between the parties that may arise' had to be determined by an arbitrator. This included 'disputes related to interpretation' of the agreement, as well as 'disputes of a legal nature'. It further stated that the award would be final and binding, and the parties undertook to give effect to the award.

[8] The arbitration had to take place before a single arbitrator in terms of the rules of the International Chamber of Commerce (the ICC). Under these rules, a sole arbitrator has to be of a nationality other than those of the parties. No provision was made for an arbitral appeal board. Mr. Boswood was appointed accordingly.

[9] The terms of reference cited and incorporated the arbitral clause. In addition, they provided that the issues that had to be decided were those that arose from the claims and counterclaims as set out in the pleadings. Importantly, they contained a provision to the effect that the arbitrator did not necessarily have to decide all the issues raised in the pleadings if he deemed it unnecessary or inappropriate. On the other hand, he could also decide 'any further issues of fact or law' which he, in his discretion, deemed 'necessary or appropriate'. And he was entitled to decide the issues 'in any manner or order he deems appropriate.'

[10] Both the proper law and the law governing the arbitration proceedings were, in terms of the Integrated Agreement, South African law, and our courts have jurisdiction over the arbitration and the review proceedings.

C. The Non-Variation Clause

[11] One of the principal complaints of Telkom was that the arbitrator did not understand and did not apply our law dealing with variations of written contracts. The Integrated Agreement contained a non-variation clause - the contract could only have been amended by means of a written agreement signed by certain duly authorised persons - as well as a provision preventing either party from relying on waiver or estoppel. The exact terms of the non-variation clause are of little consequence because it is common cause that the Integrated Agreement was not amended according to its terms.

[12] The effect of a non-variation clause has been the subject of two judgments of this Court, namely *Shifren*[7] and, latterly, *Brisley v Drotsky.*[8] For the sake of convenience t intend to refer to the principles as the *Shifren* doctrine. The arbitrator, although not formally schooled in South African law, understood the principles perfectly well and he summarised them in these terms: A non-variation clause is in principle valid; it takes effect so as effectively to entrench both itself and all the other provisions of the contract against oral variation; courts do not have a general discretion to ignore it in favour of an oral amendment on the ground of some over-arching notion of bona fides; and the principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these

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[7] *SA Sentrale Ko-op Graanmaatskappy BpK v Shifren* 1964 (4) SA 760 (A).

[8] 2002 (4) SA 1 (SCA).

may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate. This would mean, as Telkom correctly accepted during argument, that a party may not rely on a non-compliant variation (for instance, in its pleadings) and subsequently invoke the non-variation term in order to avoid the effect of the amendment.

[13] To this the arbitrator added:[9]

> 'My own provisional view, expressed with all due diffidence, would be that the position may be very different in a case where the evidence shows that A and B have orally agreed on a mode of performance by B of his contractual obligation to A different from that originally specified in the contract, where that different mode of performance was agreed upon *for the mutual benefit of both parties*, and where B has, to the knowledge and with the acquiescence of A, *done the work and/or laid out the necessary resources in pursuance of that different made of performance*. In such a case it would be, to say the least, most surprising *if* the law was that A, when presented with the results of B's substituted performance, could simply refuse to accept it on the ground that the agreement to such substituted performance was not concluded in writing or otherwise memorialized in accordance with the requirements of a No Oral Variation Clause. I was shown a number of authorities which strongly suggest that such is, indeed, not the law.'

He relied in this regard on the judgment in *Van der Walt v Minnaar*[10] which, it would appear to me, provides some

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[9] Emphasis in the original.

[10] 1954 (3) SA 932 (O).

support for his view. The effect of *Van der Walt v Minnaar* is, quite sensibly, that the acceptance of substituted performance does not amount to a variation of the contract.

D. The Structure of the Integrated Agreement and Telcordia's Delivery Obligations

[14] Telkom provides mainly two types of telecommunication services: voice and non-voice. Voice services are services and network components that provide customers with the ability to transmit voice conversations over a telecommunication network. Non-voice services enable customers to transmit data. The main object of the Integrated Agreement was to provide Telkom with a state-of-the-art automated telecommunication system driven by 14 different highly specialized software products. These had to be developed and individualized to satisfy Telkom's specific operational requirements. They had to provide Telkom with the capability of managing both Voice and Non-Voice Flow-Thru service activation and provide quality assurance of the activated services. Flow-Thru was defined as an end to end process flow. The information had to flow between functions, organisation parts, and groups of systems.

[15] These software systems had to be delivered in phases called releases. For present purposes two releases are important: Telcordia had to ship (a) the Voice Software on 30 June 2000; and (b) the Non-Voice Software on 29 December 2000. The total contract value of the Voice software was some US$ 51,8m and US$ 34,8m for the Non-Voice software.

[16] Both shipments of software had to be preceded by the shipment (six months earlier) of the 'specifications' of the software to be delivered. These 'Software Feature Specifications (FDD)' were defined in the Integrated Agreement. It is important to note at this juncture that the arbitrator found as a fact that specifications - called FSDs or Feature Specification Descriptions - were mutually

developed and agreed between Telcordia and Telkom, and that Telkom had paid for them some US$ 5,18m and US$ 3,48m respectively on the agreed dates.

[17] The essence of the dispute the arbitrator was called on to decide at the proceedings that gave rise to the interim award related to the benchmark of Telcordia's software Voice ('06/00') and the Non-Voice ('12/00') delivery obligation. This depended on an interpretation of the Integrated Agreement.

[18] Thus far I may have created the impression that the Integrated Agreement was a contract that could be read and understood from the first page to the last. Nothing could be further from reality. But first some background. In October 1998, Telkom issued to prospective bidders a Request for Bid, setting out its requirements. Telcordia responded by means of Statements of Compliance (SOC), contained in 14 binders, stating the extent to which it could or would comply with the Request for Bid. The updated Request for Bid and SOCs were incorporated into the Integrated Agreement as 'exhibits'. (The Integrated Agreement had various parts, all except the first (which was also called the Integrated Agreement) referred to as exhibits; and all had different contractual rankings.)

[19] The Project Plan (exhibit F) ranked first. The Project Plan was defined as the detailed plan and schedule for the delivery of the software systems. It was to include the delivery milestones for the software and the dates on which it had to be delivered; and it was to identify the capability of the software (the 'specific functionality (and features) to be included in each release of the Licenced Software delivered by Telcordia on a particular delivery milestone'). The Project

Plan could have been amended by means of the 'scope change provisions'.[11]

[20] The Project Plan consisted of a number of 'annexures'. Annexure A was the Flow-Thru WBS (work breakdown structure) Project Schedule for the execution of the various tasks required. Annexure B was a bar chart containing a very brief summary of some of the Information set out in Annexure A. For instance, in relation to the Non-Voice release it indicated the shipping date and then gave the periods for installation, testing, live pilot and production/ rollout. This particular bar contained a caveat which is dealt with later. Annexure D contained a payment schedule while Annexure E set out certain general assumptions as well as Telkom's responsibilities, and some conditions precedent.

[21] Exhibit C, ranking lower than the Project Plan, dealt with the software 'specifications' and defined this term. In particular it stated in clause 9.2 that the software had to be delivered in compliance with the conditions of the Integrated Agreement and that the Project Plan would be the operative document for Telcordia's delivery obligations.'[12]

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[11] The arbitrator found that no such variations had taken place.

[12] 9.2 Contractual Delivery Date

'9.2.1 The Contractual Delivery Dates specified in the Project Plan are of the utmost importance. Non-compliance with said dates will constitute a material breach of this Agreement. Partial delivery will not constitute Delivery.

9.2.2 The Licenced Software will be delivered in accordance with this Agreement and the Project Plan set forth as Exhibit F to the Integrated Agreement. The true intention and meaning of this Agreement is that the SUPPLIER will, in all respects, supply, deliver, install, commission, render and complete the Licenced Software in a workman-like manner to the satisfaction of TELKOM

(footnote continued on next page)

[22] I have not quoted the text of the other relevant contractual provisions because they have been set out in great detail by both the arbitrator and the high court and because this judgment is not concerned with the Interpretation of the Integrated Agreement but with the question whether the arbitrator committed reviewable irregularities.

E. The Dispute

[23] I have already alluded to the dispute between the parties concerning Telcordia's delivery obligations. Telcordia, in short, contended that it had to deliver software that complied with the preceding specifications (the FSDs), which had been mutually developed and agreed upon, and had been paid for by Telkom. Telkom, on the other hand, argued that the Project Plan had precedence over Exhibit C, which contained the definition of 'specifications'. The Project Plan, it said, in terms of the Integrated Agreement had to identify the specific functionality and features of each release. This meant that these must be sought in the Project Plan, especially the WBS read with the bar chart. In any event, clause 9.2.2 required that the software should be in accordance with the Project Plan. Because the Project Plan was not specific and did not detail the required functionalities and features, the Integrated Agreement by necessary implication required that *all* the features and functionalities necessary for purposes of providing the 06/00 Voice and 12/00 Non Voice Flow-Thru had to be included in the respective releases.

[24] Telcordia justified its 06/00 delivery and its tender to deliver the 12/00 Software on its interpretation of its

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(footnote continued from previous page)

as mutually agreed in the Proposal and the acceptance criteria mutually agreed upon by the Parties.'

delivery obligations. Telkom, relying on its contrary interpretation, disputed that Telcordia had duly performed in relation to the 06/00 release, which justified its refusal to pay the balance outstanding on that release; and, in addition, Telkom rejected Telcordia's tender of the 12/00 software. Telcordia therefore sent Telkom a notice, requiring it to cure its alleged repudiation. Telkom refused to do so and Telcordia accordingly sent a notice of cancellation. Telkom, in turn, purported to cancel on the ground that Telcordia's delivery of the 06/00 and its tender of the 12/00 software were not in accordance with its obligations under the Integrated Agreement; and that Telcordia's attempted cancellation amounted to a repudiation, which Telkom accepted. Many of the claims and counterclaims were therefore dependent on the correct interpretation of the Integrated Agreement in relation to the capability of the software that had to be delivered.

F. Telcordia's Claims

[25] Some of Telcordia's claims need special mention because of the fact that they play a role in this judgment. Claim B was in respect of the balance owing in respect of the 06/00 release. Telkom had paid 60 per cent of the amount due on delivery but had failed to pay the balance. Telcordia relied in the main on the Integrated Agreement for its entitlement to be paid. In the alternative it relied on the so-called London agreement, something I deal with in part T of this judgment. This agreement was concluded orally in London on 12 October 2000. Telkom undertook to pay the 60 per cent immediately (which it did) and the balance with the 12/00 release. All this is common cause. What is not is Telkom's reliance on conditions precedent for payment of the 40 per cent.

[26] Claim C was for the moneys due as a result of the 12/00 release, of which Telkom refused to accept delivery.

These moneys were claimed on either a contractual basis or as damages.

[27] Claim G dealt with Out of Scope services (extras). As mentioned, there is a provision dealing with changes to the Project Plan by means of extras. Telkom's plea to this claim included a reliance on the *Shifren* principle. Significantly, for what follows, it was not raised in connection with any other claim, including claims B and C.

G. The Second Amendment

[28] Telcordia's so-called second amendment was an amendment to its plea to Telkom's counterclaim. There it raised an alternative, based on the supposition that Telkom's primary interpretation would have been upheld and Telcordia's interpretation rejected. In this Telcordia relied in relation to the Non-Voice software on a term of the moratorium agreement, which had been entered into 'on or about 1 April 2000', and also on an oral or implied agreement somewhat later concerning the Voice software. Telkom informed the arbitrator that it would rely on *Shifren* and Telcordia stated that it would raise estoppel. These issues were not expressed in the pleadings because the ICC rules do not permit further pleadings but they were nevertheless issues in the arbitration and were articulated in para 3 of the May issues.

H. The May Issues

[29] The parties agreed during the course of the arbitration to a separate adjudication of some aspects of the case. The issues thus formulated were referred to as the May issues. The outcome would have disposed of much of the case: indeed, Telkom's view was that a ruling in its favour would have disposed of all Telcordia's claims. As it turned out, the ruling was in Telcordia's favour and a dismissal of all Telkom's claims followed.

[30] The May issues were thus formulated (para 2.1 reflecting Telcordia's interpretation of its contractual obligations while para 2.2 reflected Telkom's understanding):[13]

> 1. On a proper construction of the Integrated Agreement (IA) dated 24 June 1999, having regard to the terms thereof and all admissible evidence in relation thereto:
>
> 1.1 What is the contractual baseline for determining the specific features and functionality of the software to be delivered by Telcordia to Telkom in each of the various software releases provided for in the IA;
>
> 1.2 How are the contractual delivery dates for particular software features and functionality to be determined?
>
> 2. In particular, on a proper construction of the IA, having regard to the terms thereof and all admissible evidence in relation thereto, was Telcordia required:
>
> 2.1 to deliver software in June and December 2000 which complied with the Feature Specification Descriptions (FSDs) in respect of each of those software releases (as contended by Telcordia); or
>
> 2.2 to deliver all features and functionality necessary for purposes of providing Voice Flow-Thru by way of the June 2000 software releases and all features and functionality necessary for purposes of providing Non-voice Flow-Thru by

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[13] It is not necessary to quote paras 4 and 5.

way of the December 2000 software release (as contended by Telkom)?

3 If Telcordia was required in terms of the IA to deliver all features and functionality necessary for purposes of providing Voice Flow Thru by way of the June 2000 software release and all features and functionality necessary for purposes of providing Non-Voice Flow-Thru by way of the December 2000 software release, was Telcordia's obligation modified in any way as a consequence of the allegations pleaded in Telcordia's second amendment (of which notice was given on 25 March 2002) and, if so, in precisely what way was the obligation modified?

I. The Arbitrator's Award

[31] The arbitrator accepted Telcordia's interpretation in relation to the primary question and accordingly found it unnecessary to deal with the subsidiary questions. He went further by disposing of another issue, namely the repudiation issue. This he did by holding that Telkom had repudiated the Integrated Agreement and that Telcordia had validly accepted the repudiation, and by dismissing Telkom's counterclaims. Whether he was entitled to do this is a matter which is dealt with in the accompanying judgment of Cloete JA where the relevant parts of the award are quoted. Suffice it to say already at this juncture that the position of the parties, as expressed by Telkom, was that the arbitrator was requested, in the best interests of the parties and in accordance with the spirit of the ICC rules; to decide as many of the issues that could fairly have been determined in the light of the evidence, both oral and written, led at the May proceedings.

J. The Grounds for Review

[32] The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available.[14]

[33] Telkom, in its founding affidavit relied for reviewing the arbitrator's award on some of the provisions of s 33(1) of the Act. It reads:

'Where–

> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

Telkom did not rely on para (c) but on misconduct under (a) and the two grounds of (b), namely, gross irregularity and the exceeding of power.

[34] Telkom alleged that the arbitrator had committed gross irregularities in the conduct of the proceedings by -

> (i) breaching an undertaking or promise to receive further evidence relevant to the 'London agreement';

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[14] Uniform r 53.

(ii) failing to refer legal questions for the opinion of the court under s 20; and

(iii) proceeding to hand down his award in the face of a pending s 20 application.

[35] The accusation of misconduct in relation to his duties was based on the allegations that the arbitrator –

(i) had made key findings which were 'grossly incorrect, unfair and unreasonable'; and

(ii) had expressly ignored relevant evidence which manifested bias and partiality.[15]

[36] The statement that the arbitrator had exceeded his powers was based on the allegations that –

(i) he proceeded to hand down his award in the face of a pending s 20 application;

(ii) he had made key findings which were 'grossly incorrect, unfair and unreasonable'; and

(iii) he had ignored important provisions of the Integrated Agreement.

[37] The arbitrator filed a short report to the court in which he dealt with the nub of the attack on his integrity; his alleged inability to deal with South African law; the allegation that he had made findings for which there was no evidence; his alleged breach of an undertaking; and some allegations concerning s 20.

[38] Telkom used, if not abused, its right to amplify by filing a supplementary affidavit of 120 pages in which it attacked the arbitrator's report and expanded on the allegation of bias. In addition, Telkom raised a new ground

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[15] The allegation relating to bias and partiality was also linked to the common law but nothing turns on this.

of review, relating to the finding that Telcordia had validly cancelled the agreement and the dismissal of Telkom's counterclaims. This argument was based on both legs of s 33(1)(b).

[39] In its replying affidavit and without explanation or apology Telkom withdrew the allegation of misconduct. This allegation, as noted, had two legs but as time went on Telkom sought, successfully in the high court, to rely on some of the facts that were proffered in support of this allegation.

[40] At the hearing in the high court Telkom relied on two review grounds only, namely the s 20 issue and the repudiation issue. But during Telcordia's argument in answer, and through the intervention of the court, the alleged 'grossly incorrect' findings (on which Telkom no longer relied) were metamorphosed into 'gross irregularities' and expanded, and, in the event, became the basis of the judgment below.

[41] The case as developed by Telkom in its written argument also deviated appreciably from the allegations that were levelled against the arbitrator in the founding papers, and the number of points taken was in inverse proportion to their merit. During the hearing of the appeal another seismic shift took place.

[42] Symptomatic of this case is the 'verbal manipulation'[16] indulged in by the high court and by Telkom by reclassification and relabelling. As the Bard said about roses, a spade remains a spade even if called a shovel or a pitchfork. Telkom for example raised for the first time on appeal the complaint that the arbitrator had acted irrationally. It spent pages and pages on the legal argument but did not

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[16] A phrase used by Wade and Forsyth *Administrative Law* 8 ed at 270.

even bother to provide us with the factual foundation for tl submission. This came only after a questionnaire from th Court was put to the parties. In the answer given by Telko we were told that what in the past had been called gro irregularities or misconduct was now irrational behaviou For the legal submission Telkom relied on the panoply of t common law, the rule of law, the right to a fair trial, the rig to property, and the Act. During oral argument, thoug Telkom limited its submission. Irrationality, it now said, w a species of gross irregularity. This submission failed appreciate that irrationality is an outcome standard while, I shall demonstrate, gross irregularity is a process standa Interestingly, it is not alleged that the arbitrato interpretation of the Integrated Agreement was irrational. will appear in due course, there is no factual basis for any these attacks.

[43] After all is said and done, the grounds of revi ultimately relied on were these:

> (a) by interpreting the Integrated Agreement incorrectly the arbitrator committed a material error so fundamental that he misconceived the nature of the inquiry and his duties;
>
> (b) by breaching an undertaking to hear oral evidence on the London agreement the arbitrator committed a gross irregularity;
>
> (c) by denying Telkom the opportunity to apply to court under s 20 of the Act for an order compelling him to state legal questions for the decision by the court, the arbitrator committed a gross irregularity and acted irrationally;
>
> (d) by deciding the repudiation question and dismissing Telkom's counterclaims the arbitrator exceeded his authority and decided a question

without evidence, thereby committing a gross irregularity and acting irrationally.

K. The Relationship between the Constitution and the Arbitration Act

[44] As a starting point, the constitutionality of the Arbitration Act is not in issue and its validity is a given.[17] Indeed, Telkom conceded without any judicial prodding that the Act as interpreted by our courts passes constitutional muster. However, the Act must be read in the light of the provisions of the Bill of Rights and the meaning attributed to it must promote the spirit, purport and objects of the Bill of Rights.

[45] Two sections of the Bill of Rights were raised during argument. They are s 33, which deals with just administrative action, and s 34, which deals with access to courts. In the light of the judgment of this Court in *Total Support*[18] the administrative justice provision can be discounted. There it was pointed out that administrative justice is concerned with the exercise of public power or the performance of a public function, something with which consensual arbitration is not concerned.[19] Smalberger ADP said in this regard (para 24):

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[17] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29.

[18] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA).

[19] Cf *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (3) BCLR 241, 2000 (2) SA 674 (CC) para 45: 'Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional

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> 'Arbitration does not fall within the purview of "administrative action". It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the patties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.'

Telkom did not argue that this decision was wrong and approached the matter from a different angle, as I shall indicate later.[20]

[46] That brings me to the access to courts provision, s 34, which reads as follows:

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where

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principles which define the authority of each branch of government, their interrelation ship and the boundaries between them.'

[20] The position with statutory arbitrations is different: *Rustenburg Platinum Mines Ltd v CCMA* [2006] 115 (RSA).

> appropriate, another independent and impartial tribunal or forum.'

[47] The question whether s 34 is at all applicable was also discussed in *Total Support* but this Court left the question open. On balance, I believe that s 34 is indeed applicable. This would be in accordance with the approach of the European Court of Human Rights (ECHR).[21] But, as Smalberger ADP said (para 28), there is nothing to prevent parties from defining (at least in private consensual disputes) what is fair for purposes of their dispute. This is consonant with the approach in *Napier v Barkhuizen*[22] where Cameron JA, with reference to *Brisley v Drotsky*,[23] said (para 12):

> 'the Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements. Their importance should not be under-estimated.'

And (para 13):

> 'the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of "freedom of contract", while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should

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[21] *Suovaniemi v Finland ECHR* case no 31737/96 (23 Feb 1999).

[22] [2006] 2 All SA 459 (SCA). See also *Marlin v Durban Turf Club* 1942 AD 112 at 130 *in line*.

[23] 2002 (4) SA 1 (SCA) para 94 and 95.

countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.'

(48] The rights contained in s 34 (as the ECHR accepted) may be waived unless the waiver]s contrary to some other constitutional principle or otherwise *contra bonos mores.* Parties to a private dispute may, for instance, compromise their dispute and thereby forego all their rights under s 34. By agreeing to arbitration, parties waive their rights *pro tanto.*[24] They usually waive the right to a public hearing. They may even waive their right to an independent tribunal.[25] Counsel gave the example of two children who ask a parent to arbitrate their commercial dispute. The example in the ECHR is even more telling. The parties each appointed their own arbitrator and they, in turn appointed a third. The one arbitrator had earlier acted for and advised the one party to the dispute. 'The second party became aware of this but proceeded happily with the arbitration. The national court had held that the second party thereby waived his right to an independent tribunal. The ECHR confirmed that such a waiver was permissible and not inimical to a fair trial guarantee similar to that in s 34.

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[24] *First Options of Chicago Ire v Kaplan* 115 8 Ct 1920; 514 US 938 per Breyer J: '. . . a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.'

[25] This is not possible under the ICC rules although it has always been possible under our legal system: Johannes Voet 4.8.9; *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 373; *Marlin v Durban Turf Club supra.*

(49] In this case, by agreeing to arbitration under the]CC rules, the parties agreed (in terms of art 28.1) to the following:[26]

'Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to recourse insofar as such waiver can validly be made.'

In addition, art 33 provides:

> 'A party who proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitration Tribunal, or to the conduct of the proceedings, shalt be deemed to have waived its right to object.'

[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.[27] Typically, they agree to waive the right of appeal,[28] which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered.[29] They may,

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[26] *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZR 669.

[27] They may even reduce the level of procedural fairness by, e g, agreeing that the arbitrator may decide the matter without hearing them.

[28] Without a special provision there is in any event no appeal possible because appeals are only possible from lower courts tc higher courts.

[29] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169F-G; *CBI NZ Ltd v Badger Chiyoda*

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obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as will become apparent, the common-law ground of review on which Telkom relies is contained - by virtue of judicial interpretation - in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgment below and the argument presented to us, it is incumbent on me to take the tortuous route.

L. The Meaning of Section 33(1)(6): 'Gross Irregularity' and 'Exceeding Powers'

(52] The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all:[30]

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[1989] 2 NZR 669. This is also possible in ordinary litigation and is specifically provided for in the Magistrates' Courts Act 32 of 1944 s 82.

[30] *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 pare 24. Emphasis added. Cf *Bull HN Information Systems Inc v Hutson* 229 F 3d (1st Cir 2000) 321 at 330: 'To determine whether an arbitrator has exceeded his authority ... courts "do not sit to hear claims of factual or legal error ...."... and "[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards" . . .'

> 'But the issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(6) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. *If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved.* Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail.'

Apart from the proper application of the test nothing more was made in argument of the meaning of the term. The argument focussed on the meaning of 'gross irregularity in the conduct of the arbitration proceedings.'

[53] This term must be understood in context, historical and textual. (I have already dealt with the constitutional considerations.) The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior courts.[31] Although the textual setting

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[31] Supreme Court Act 59 of 1959, s 24(1):

'The grounds upon which the proceedings of any inferior court may be brought under review before a [high court], are

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(footnote continued on next page)

is different, which might affect its meaning,[32] I am content to hold that for present purposes the two provisions are identical and that cases decided in relation to the review of inferior courts are relevant in determining the meaning and scope of para (b).

[54] The Act was preceded by three colonial statutes. They, following the approach of the pre-Union courts, broke completely with the Roman-Dutch tradition by providing that an arbitral award is not appealable, that is, that its merits may not be the subject of attack.[33] But they particularly provided that an award could be set aside on the ground of misconduct or if improperly procured.[34]

[55] The review of an award based on a wrong construction of a deed of partnership was the subject of *Dickenson & Brown*.[35] This Court held that a review on this basis was impermissible on two grounds. The first was the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was. Second, the colonial laws (in that case the one

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(footnote continued from previous page)

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[32] One problem, which does not arise in this case, concerns the boundary between 'misconduct and 'gross irregularity'. These two concepts may overlap, especially if regard is had to the fact that historically 'legal misconduct' was nothing other than a procedural lapse: *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (QBD) per Bingham J.

[33] *Dutch Reformed Church v Town Council of Cape Town* 15 SC 14 at 21; *Dickenson & Brown v Fisher's Executors* 1915 AD 168 at 174.

[34] Eg Arbitration Act 29 of 1898 (C) s 17.

[35] Above.

of Natal) did not change the position. Such an error, he held could not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct.[36]

[56] Solomon JA recognised that it would have been a valid ground for setting aside the award if an arbitrator had 'exceeded his powers': to exceed one's powers does not go to merit but to jurisdiction. He also held that there is no distinction between a mistake on the face of the award and one not appearing on the face of it, a rule abolished in England only in 1969.[37] Furthermore, he held that the English rule, which permitted courts to set aside awards on the ground of mistakes of law, was not part of our law.[38]

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[36] Cf *Crystal Springs Aerated Water Co v Kan* 1902 TH 21 at 27.

[37] At 167-169, *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL).

[38] At 177-178. English law at that stage provided that if a specific question of law was submitted to an arbitrator, as happened in this instance when the interpretation of the Integrated Agreement was submitted to the arbitrator for decision, an erroneous decision could not have been reviewed. 'Otherwise it would be futile ever to submit a question of law to an arbitrator: *In re King and Duveen* (1913] 2 KB 32 at 36. But if a question of law had not specifically been referred but was material to the decision, and he made a mistake, apparent on the face of the award, the award could be set aside: *Attorney-General for Manitoba v Kelly* (1922) 1 AC 268 (PC) at 283. To decide whether there was an error 'apparent on the face of the award' the court could only have regard to the terms of the award or some paper accompanying and forming part of the award. Also *FR Absalom Ltd v Groat Western (London) Garden Village Society Ltd* [1933] AC 592 (HL). As to the artificiality surrounding the meaning of 'forming part' see *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1962] 2 All ER 53 (CA).

[57] Did the introduction by the 1965 Act of para (b) indicate a changed intention? Is it likely that the legislature would have intended to introduce a review on substantive grounds (taking into account that an appeal is also not possible) by using the procedural language of 'gross irregularity in the conduct of the arbitration proceedings'? I think not and this Court also did not think so when called upon to decide the effect of errors of law on an award under the current Act. In two instances, namely *Veldspun* and *Total Support* this Court confirmed the correctness of the *Dickenson & Brown* approach.[39]

[58] Telkom expressly disavowed reliance on a general power of courts to review errors of law committed by arbitrators but instead relied on (1) a common-law power to review awards that are tainted by 'material errors of law' and (ii) s 33(1)(b), arguing that where the arbitrator misconceives the whole nature of the inquiry or his duties in connection therewith he commits a gross irregularity in the proceedings, The high court, I should mention, decided the matter on ground (ii).

[59] I intend to deal first with the common-law point. As Telcordia mentioned, Telkom was unclear on whether it intended to rely on the common law relating to arbitration or that concerning administrative law. *Dickenson & Brown,*[40] I have said, held that there was no common-law review under arbitration law. In addition, I have already expressed the view that a party to a consensual arbitration under the Act is not entitled to rely on an administrative common-law review ground.

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[39] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A); *Total Support Management (Pty) Ltd v Diversified Health Systems* (SA) *(Pty) Ltd* 2002 (4) SA 661 (SCA).

[40] Above.

[60] In our law the principles of administrative justice have now been subsumed by the Constitution and, as stated, the considerations underlying them are different from those that apply to arbitration. This difference has also been recognised in England, as Lord Steyn said:[41]

> 'The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1959] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the 1996 [English Arbitration] Act.'

[61] Telkom sought to rely in argument on *Anisminic* and a statement by Malan J[42] (relying indirectly on *Anisminic*) for the proposition that all decisions based on a material error of law stand to be reviewed. As mentioned, *Anisminic* was concerned with administrative action, as was Malan J's judgment. In any event, *Anisminic* has been misunderstood by many, including Denning MR, who sought to derive from it the general principle mentioned by Malan J. Denning MR put his view with characteristic vigour when he said in a public lecture that no court or tribunal has any jurisdiction to make an error of law on which the decision of the case

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[41] *Lesotho Highlands Development Authority v Impregiio SpA* [2005] UKHL 43 para 25.

[42] *South African Jewish Soard of Deputies v Sutherland NO* 2004 (4) SA 368 [W) at para 27.

depends.[43] He was soon put right by the House of Lords in *Racal*.[44]

[62] *Racal* was followed by the House in *Page*,[45] a judgment on which Malan J relied for his general proposition so eagerly embraced by Telkom. The House emphasised[46] that in the case of decisions of administrative tribunals made under statutory powers a relevant error of law in the actual making of the decision, which affects the decision, may be corrected on review unless Parliament intended that the administrative body was to be the final arbiter of questions of law. If, however, a law provided that a judicial body's decision was to be final and conclusive on a question of law, there was no reason to assume that a review would be permitted. In *Page* the issue concerned the position of a 'visitor', someone who, in terms of university rules, was the 'sole judge' of the interpretation and application of the university's domestic rules. Errors of law committed by a visitor within his jurisdiction were held not to be subject to judicial scrutiny.

[63] As mentioned, even before the 1979 English Arbitration Act, legal questions, such as the construction of a contract that had been specifically referred to an arbitrator, could not be reviewed on the ground of error.[47] In the

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[43] Quoted by Malan J.

[44] *Re Racal Communications Ltd* [1980] 2 All ER 634 (HL). Also in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 All ER 689 (HL) at 692f-j.

[45] *Page v Hull University Visitor* [1993] 1 All ER 97 (HL).

[46] Per Lord Browne-Wilkinson at 108j.

[47] *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592 (HL).

present case, it will be recalled, the interpretation of the contract was specifically referred to the arbitrator.

[64] This Court, in *Hira v Booysen*,[48] dealing with a statutory administrative tribunal, referred with approval to *Anisminic* and to *Racal*, and did so without suggesting that the Denning approach, which had been rejected in *Racal*, was correct. It was in this context that Corbett CJ formulated the following rule (at 93C-D):

> 'Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.'

[65] Corbett CJ was at pains to draw a distinction between common-law reviews and those based on statute (such as the present)[49] and to state expressly that the quoted rule (and the others mentioned by him) applies to the former.[50] Apart from the fact that I do not believe that he intended to propound a rule applicable to consensual arbitrations, the rule would in any event prevent the review of material errors of law because the arbitrator was, subject to the limitations in the Act, intended to have exclusive jurisdiction over questions of fact and law. That follows

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[48] 1992 (4) SA 69 (A).

[49] Eg at 83G-H, 851-J, 87A, 88B-C. As Botha JA mentioned, the statutory grounds are narrower than the common-law grounds: *Paper, Printing, Wood & Allied Workers' Union v Pienaar* NO 1993 (4) SA 621 (A) at 639E-F.

[50] At 93A.

from the provisions of the Act, which exclude appeals and limit reviews. The fact that a court may be approached to decide a question of law under s 20 does not affect this conclusion. If s 20 were used, a review or appeal for an error of law is not possible because, once again, the opinion of the court (of first instance) and even that of counsel (learned or otherwise) is final. A statutory provision such as that contained in s 28, that unless the arbitration agreement provides otherwise, an award is, subject to the provisions of the Act, final and not subject to appeal, and that each party to the reference must abide by and comply with the award in accordance with its terms, clearly indicates that the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions were submitted to it, including any question of law. That is what the parties agreed. This does not imply that the arbitrator has the exclusive right to decide the scope of his jurisdiction because if he exceeds his powers the award is reviewable on that ground.

[66] Telkom also sought to rely on a tacit term of the arbitration agreement, submitting that it would not have agreed to a term permitting the arbitrator to commit a gross error of law. In this regard Telkom referred to what Jansen JA had said in *Theron*[51] when dealing with the interpretation of a constitution of a church, namely that it is not to be assumed that parties to a contract would have agreed to be

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[51] *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A) at 21E-F. What Jansen JA had to say about arbitrations was put in perspective in *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 99-100. See also *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) paras 19-21.

subjected to unreasonable actions.[52] Although I agree with the generality of the proposition, it should be stressed that the judgment of Jansen JA dealt with the question of whether a church body had interpreted its constitution correctly and had followed the correct disciplinary appeal procedure: in other words, he sought to determine the scope of the mandate of the church body as agreed in its constitution. This question, he held, was not something falling within the exclusive jurisdiction of the church body. Apart from the fact that the principles concerning domestic tribunals are not the same as those governing administrative or arbitration proceedings[53] here the scope of the arbitrator's mandate is not in issue.[54]

[67] in any event, the parties bound themselves to arbitration in terms of the Act and if the Act, properly interpreted, does not allow a review for material error of law, one cannot imply a contrary term. Also, parties cannot by agreement extend the grounds of review as contained in the Act.

[68] Even assuming the jurisdiction to review on the ground of material error of law, the question arises as to what is meant by the adjective `material'. Telkom sought to draw a distinction between 'mere' errors and 'material'

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[52] A much wider statement by Van Dijkhorst J in *Stocks Civil Engineering (Pty) Ltd v Rip* NO (2002) 23 ILJ 358 (LAC) para 38 is contrary to all authority. obviously, the supposition underlying any arbitration agreement is that the arbitrator has to apply the law of the land; it does not follow that if he errs his award can be set aside.

[53] *Lamprecht v McNeillie* 1994 (3) SA 665 (A) at 668, Also *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (CA) at 1180D-1181.

[54] This does not apply to the repudiation issue but that is a separate matter.

errors and in effect argued that all errors that make a party lose the arbitration are material. This approach renders the difference between appeals and reviews meaningless and in effect gives a right of appeal, which the Act prohibits.

[69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.

[70] *Hira v Booysen* concerned the scope of the tribunal's mandate or 'jurisdiction'. The tribunal had to determine whether Hira had done something 'in public'. It misconstrued this term, which defined its powers, and, accordingly, committed a 'material' error. Fortunately I need not pursue this further because Telkom relied on only one type of error as being material: where a decision maker misconceives the whole nature of the inquiry or his duties in connection therewith. This common-law ground also applies to a review under a statute that provides that a gross irregularity in the course of the proceedings may be reviewed. It is therefore unnecessary to delve much further and redo the exercise that Corbett CJ did in *Hira v Booysen* and analyse the line of cases again.

[71] That brings me to the judgments of Greenberg and Schreiner JJ in *Goldfields Investment*.[55] The case dealt with a review of a lower court on the statutory ground of 'gross

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[55] *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.

irregularity' and held that the term encompasses the case where a decision-maker misconceives the whole nature of the inquiry or his duties in connection therewith. In the light of the general acceptance of the rule, also by this Court, a reconsideration of its validity, does not arise. But that is not the end of the inquiry because it is apparent that both the high court and Telkom misunderstood the rule and misapplied it. I therefore propose to analyse the case law in this regard and then consider whether the arbitrator's alleged misconceptions fall within the rule.

[72] It is useful to begin with the oft quoted statement from *Ellis v Morgan*[56] where Mason J laid down the basic principle in these terms:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

[73] The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate.[57] *Goldfelds Investment* provides a good example. According to the applicable Rating Ordinance any aggrieved person was entitled to appeal to the magistrates' court against the value put on property for rating purposes by the local authority. The appeal was not an

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[56] *Ellis v Morgan, Ellis v Dessai* 1909 TS 576 at 581.

[57] *Mabaso v Native Commissioner, Ladysmith* 1958 (1) SA 130 (N) provides another example. For common-law review examples see *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) esp at 598A-D.

ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been 'manifestly untenable'. This meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act directed him to ask.[58] In this sense the hearing was unfair. Against that setting the words of Schreiner J should be understood:[59]

> 'The law, as stated in *Ellis v Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to

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[58] *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 234A-B.

[59] At 560-561, emphasis added.

the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial.* One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. *I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section.* That being so, there was a gross irregularity, and the proceedings should be set aside.'

[74] The other line of cases, which dealt with reviews of inferior courts, was concerned with orders made where a jurisdictional fact was missing or, put differently, 'a condition for the exercise of a jurisdiction had not been satisfied'.[60] A typical example is *Primich*.[61] The magistrate

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[60] An expression used in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 230C.

[61] *Primich v Additional Magistrate, Johannesburg* 1967 (3) SA 661 (T).

could order, in terms of the relevant court rule, the provision of security if the plaintiff was not resident in the country. The magistrate, in spite of the limitation on his jurisdiction, made such an order against a plaintiff who was resident in the country. Objectively, this was not a case of an error of law; it was an error of fact dressed up as an error of law. Decisions of a factual nature can all too easily be dressed up as issues of law.[62] There was no indication that the magistrate had misinterpreted the rule; he misunderstood the facts, holding that a jurisdictional fact was present while it was not. A similar instance was *Visser v Estate Collins*.[63] in terms of the statute concerned, the magistrates' court could set aside a void judgment granted by default provided the application for rescission was made within one year of the date on which the applicant first had knowledge of the invalidity. The magistrate set aside a void judgment by default without any evidence as to when the applicant had become aware of the invalidity. Once again, the magistrate had failed to determine whether a jurisdictional fact for the setting aside of the judgment was present. Whether this was due to an error of law is really beside the point.

[75] In all these cases the complaint was directed at the method or conduct and not the result of the proceedings.[64] Where the legal issue is left for the decision of the functionary any complaint about how he reached his decision must be directed at the method and not the result. This is known as the *Doyle v Shenker*[65] principle.

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[62] *Page v Hull University Visitor* [1993] 1 All ER 97 (HL) at 101a.

[63] 1952 (2) SA 546 (C).

[64] *Bester v Easigas (Pty) Ltd* 1993 (1) SA 30 (C) at 42G-43D.

[65] *Doyle v Shenker & Co Ltd* 1915 AD 233.

[76] It is wrong to confuse the reasoning with the conduct of the proceedings. Although the line may be fine and sometimes difficult to draw, I believe that the following example makes the difference clear. In *Jooste Lithium*[66] the inspector had the authority to decide any dispute that could arise in regard to the validity of the pegging or beaconing of claims and to decide any dispute arising through over-pegging. Against that background O H Hoexter JA said:[67]

> 'It is clear that in deciding the disputes which he is authorised to decide, there is entrusted to the inspector the duty not only of finding the relevant facts but also of deciding the legal issues Involved (see *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 at p 825 (AD). In deciding the legal issues involved it would also be the duty of the inspector to interpret the relevant sections of the Proclamation and the regulations.'

[77) The Proclamation conferred a right of appeal from the inspector to the Administrator, whose decision was to be final, With that in mind, Hoexter JA continued:[68]

> 'It seems to me, with respect, that the learned Judge erred in holding that the Interpretation of the regulations is a matter for the Court and that the Administrator is bound by the Court's interpretation. In my opinion the Legislature intended that the regulations should be interpreted in the first instance by the inspector and on appeal by the Administrator. It is for the Administrator to

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[66] *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A).

[67] At 564G.

[68] At 569B-G, emphasis added.

decide any legal issues involved in a dispute as to the pegging of a claim, and the most important legal issue is the interpretation of the regulations. *It cannot be said that the wrong Interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to if by the statute, and it follows that the wrong interpretation of a regulation cannot afford any ground forreview by the Court.* (See *Doyle v Shenker & Co Ltd* 1915 AD 233.)

The present case differs from cases like *Goldfields Investment Ltd v City Council of Johannesburg*, 1938 TPD 551, in which the result of the wrong interpretation of a section in the relevant statute was that the magistrate never directed his mind to the issue which in terms of the statute it was his duty to decide, in the present case the Administrator must direct [his] mind to the Issue whether the requirements of the regulations have been observed and in order to decide that issue it is bound to interpret the regulations.'

[78] It will be necessary to consider the facts on which the high court relied to determine whether what the arbitrator did in this matter falls within the purview of *Goldfields Investment* or within *Doyle v Shenker*. This does not mean that the two principles are mutually exclusive. It simply means that if the arbitrator does not fall foul of *Goldfields Investment*, the principles of *Doyle v Shenker* apply.

[79] Before turning to the facts it is necessary to dispose of Telkom's concluding argument on this aspect of the case. It was that the Issue of 'gross irregularity' should be answered by asking whether Telkom, in the words of

Schreiner J, had a fair trial on the interpretation issue. That a party is entitled to a fair trial, as Telcordia said, is not contentious. Telkom accepted that the high court never had asked itself this question and that its own heads of argument had not dealt with the point. When invited by us to state why the hearing had been unfair, counsel who argued this aspect deferred to his lead counsel who, in turn, chose to disregard the invitation. We were left with a chasm between the legal and factual argument.

M. The Nature of the Inquiry, the Duties of the Arbitrator, and the Scope of his Powers

[80] Before considering the attack on the arbitrator on the ground that he had committed gross irregularities in the conduct of the arbitration proceedings (by misconceiving the nature of the inquiry and his duties) or exceeded his powers, it is necessary to determine the nature of the inquiry, the arbitrator's duties, and his powers.

[81] As mentioned at the outset, according to the integrated Agreement the arbitrator had to determine all disputes between the parties, including disputes relating to the interpretation of the agreement and disputes of a legal, financial and technical nature; the procedural rules of the ICC were to apply; the laws of the Republic would govern the agreement; and, subject to the arbitration clause, the parties consented to the jurisdiction of South African courts.

[82] The May issues, as defined, required the arbitrator to determine Telcordia's primary contractual obligation under the Integrated Agreement 'having regard to the terms thereof and all admissible evidence in relation thereto'. In this regard he had to choose between two opposing contentions. It is clear from the way the May issues were defined that the questions were interdependent and that, depending on the outcome of, say, question 1, question 3 could have fallen away.

[83] In short, the arbitrator had to (i) interpret the agreement; (ii) by applying South African taw; (iii) in the light of its terms, and (iv) all the admissible evidence.

[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties In connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the *nature of the inquiry* - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA.[69] It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

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[69] *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A).

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.[70] Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

[87] In support of this I revert to *Doyle v Shenker*,[71] a case that dealt with a review on the ground of a gross irregularity in the proceedings. Innes CJ said in a passage that speaks for itself:[72]

> 'Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an Irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear.

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[70] *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in *Anisminio Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 223D-F.

[71] *Doyle v Shenker & Co Ltd* 1915 AD 233.

[72] At 236-237.

Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to sec. 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review.'

[88] Innes CJ added:[73]

'It was suggested that, in the present instance, the fact that the magistrate did not deal with the merits, would constitute a gross Irregularity. But If he considered the document to be conclusive, there was no need to discuss the merits. He may have been wrong in that view, but that would be an error of law only, and not an irregularity.

The admission of illegal evidence is in itself an independent ground of review.[74] But the document in question was not Improperly received in

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[73] At 238.

[74] But not under the Arbitration Act.

> evidence; indeed, it could not properly have been excluded, if the magistrate's reading of It, and of the bearing of the statute upon it, was wrong, that could again be a mistake of law, which, as already pointed out, could afford no basis for review proceedings.'

[89] There is another matter that falls under this rubric and that concerns the repudiation. issue. I have already mentioned that at the conclusion of the May hearing the arbitrator was requested, in the best interests of the parties and in accordance with the spirit of the ICC rules, to decide as many of the issues as could fairly have been determined in the light of the evidence, both oral and written, led at the May proceedings. Using this power he decided that Telkom had repudiated and that Telcordia had accepted the repudiation. It was within the power of the arbitrator, in the light of the extension agreement between the parties, to decide the scope of his mandate.[75]

N. How did the Arbitrator understand his Duties?

[90] The arbitrator understood clearly that his duty was to interpret the agreement and that he had, in this regard, to choose between the conflicting contentions of Telcordia and Telkom. Nowhere in his award is there any indication that he sought to do anything else. He understood particularly well that he had to determine the meaning of the contract with reference to its true construction and that he could only have regard to admissible evldence.[76] In fact, he complained during the hearing about the relevance of some of the

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[75] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (t) SA 162 (A) where the English authorities are also mentioned. For the USA: *First Options of Chicago Inc v Kaplan* 115 S Ct 1920; 514 US 938 at 943 per Breyer J.

[76] The award is replete with references to this.

evidence relating to construction but the parties Insisted that he should hear it. He 'stressed' (his word) that his interpretation was based on the wording and structure of the Integrated Agreement itself.

[91] The arbitrator understood that he had to apply South African law. He knew that he could only rely on background evidence and not on surrounding circumstances, and he stated that he had kept this in mind in interpreting the Integrated Agreement.[77] He did not refer to any identifiable surrounding circumstances in his award although he did refer to the subsequent conduct of the parties in order to interpret the agreement without finding that the agreement was ambiguous. This he did consciously, relying on Christie,[78] who in turn relies on *Shill v Milner*[79] as explained by Goldstone J in *Briscoe v Deans*.[80] The rule is that evidence of subsequent conduct is admissible, even where the agreement is on its face unambiguous, if the parties by consent lead such evidence.

[92] The arbitrator was fully conscious of *Shifren* and, as I have mentioned, his award shows that he understood the principle and its implications fully. He did, however, come to the conclusion that the doctrine did not arise in the circumstances of the case.

[93] In the end, the arbitrator accepted Telcordia's interpretation and he answered the questions put accordingly. Some of the questions became academic as a result of the

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[77] This is not the occasion to consider whether there is any discernable difference between background facts and surrounding circumstances.

[78] RH *Christie The Law of Contract in South Africa* 5 ed p 218. The arbitrator relied on the fourth edition where the same statement appears.

[79] *Shill v Milner* 1937 AD 101 at 110-111.

[80] *Briscoe v Deans* 1989 (1) SA 100 (W) at 105B.

primary finding and therefore he did not answer them. In fact, they could not have been answered in the light of his conclusion. In answering only some questions and refraining from answering others, and in making rulings and orders consequent upon his primary finding, he consciously used the powers he had according to his terms of reference.[81]

O. The Findings by the High Court relating to the Arbitrator's Misconceptions about his Duties, and Exceeding his Rowers

[94] The findings of the high court on this issue are many and repetitive[82] and are scattered all over the judgment. I have no intention of dealing with them all but shall limit myself to the main findings. The first finding was that the arbitrator had misinterpreted the pleadings. For this the high court undertook a detailed analysis of the pleadings to find that Telkom had relied on *Shifren* in relation to the primary (interpretation) question. The problem is that Telkom had never alleged that the arbitrator had misconstrued the pleadings - it was not a ground of review - and before us Telkom did not seek to make out such a case, I can only say that the court embarked on what could in fairness be described as a judicial snipe hunt.[83]

[95] Although formulated as a separate and alternative ground, the essence of the high court's finding in relation to the interpretation of the Integrated Agreement was that the arbitrator had 'failed to refer to and apply' the applicable principles of proper interpretation, and that this constituted a misconception of the whole nature of the inquiry and of his

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[81] His findings relating to the repudiation issue will be dealt with separately.

[82] The 'additional' reasons are a repetition of the main reasons.

[83] Cf *Dawahare v Spencer* 210 F3d 666 (6th Circuit 2000) at 670.

duties in connection therewith, and that he had exceeded his powers.

[96] The statement that the arbitrator had failed to refer to the applicable principles of construction, as I have indicated in the preceding section of this judgment, amounts to a gross misrepresentation of what the arbitrator did. The court, when dealing with the inadmissibility of surrounding circumstances, provided the reader with a veritable compendium of case law while the arbitrator articulated the same rule in a single sentence but the court did not refer to a single rule of interpretation that the arbitrator had failed to take into account.

[97] Particularly disturbing about the high court's treatment of the arbitrator is that it simply ignored the fact that the arbitrator had relied on authority for utilising evidence concerning subsequent conduct *where the agreement is unambiguous* in interpreting a contract. The court did not even consider this rule - accepted by Telkom as valid - in coming to its decision. It also ignored the fact that Telkom Itself had submitted to the arbitrator that evidence of subsequent conduct of the parties would irrefutably contradict Telcordia's primary contractual argument; that no argument was addressed to the arbitrator by either party that the evidence led was inadmissible; and that Telkom did not allege in the review proceedings that the arbitrator had relied on irrelevant or inadmissible evidence. How it could be said, in these circumstances, that the arbitrator had committed a gross irregularity is incomprehensible.

[98] The high court in any event failed to distinguish between the interpretation Issue and the contractual compliance issue, a distinction the arbitrator perceived at an early stage of the proceedings. The interpretation issue was whether the 'specifications' were to be found in FSDs; and the compliance issue was whether, by delivering the

particular FSDs and, thereafter releasing or tendering the software described in the FSDs, Telcordia had complied with its contractual obligations. However, the court considered the latter also to be a matter of interpretation as is apparent from its treatment of the sign-off and disclaimer issues, matters to which I shall revert in due course.

[99] The high court's approach was to interpret the agreement afresh; to come to a different conclusion about its meaning; and then to conclude that as a result of the difference 'the arbitrator did not apply his mind thereto in a proper manner, [and] that he misconceived the whole nature of the inquiry and his duties therewith' and that he simultaneously exceeded the bounds of his powers. But it was not for the high court to reinterpret the contract; its function was to determine whether the gross irregularities alleged had been committed. By its reinterpretation the court dealt with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to follow that he had committed an irregularity. The failure to apply the applicable principles of interpretation or to come to a wrong conclusion does not amount to a 'gross irregularity', as the quotations from *Doyle v Shenker*[84] illustrate. It is circuitous to reason, as the court did, that this alleged failure amounted to a misconception of the whole nature of the inquiry and that consequently the failure amounted to a gross irregularity. The court sought to distinguish *Doyle v Shenker* on the basis that in that case the magistrate committed an error of law while acting within his jurisdiction, implying that by interpreting the Integrated Agreement the arbitrator had acted outside his jurisdiction, which is simply wrong. If one considers the length of the proceedings, the arbitrator's active involvement in defining and refining the issues, and the detailed and reasoned

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[84] 1915 AD 233.

award, it was as presumptuous as it was fallacious for the court to have held that the arbitrator did. not apply his mind properly to the issues at hand.

[100] The high court justified its approach in first interpreting the Integrated Agreement by reference to judgments dealing with statutory reviews where courts, in order to determine whether the functionary had acted within the scope of the statute, first interpreted the enabling statute. This was always done in order to determine the powers and mandate of the functionary.[85] The parallel exercise in this instance required a consideration of the terms of reference and the provisions of the Act, not of the Integrated Agreement.

[101] The gravamen of the high court's decision on the gross irregularity resulting from a wrong interpretation was that the arbitrator had failed to apply *Shifren* when answering the primary question about the delivery baseline. In addition, the court relied on what it thought were three further errors of interpretation to which I shall revert. As stated before, I do not intend to reinterpret the contract because that is not the issue and it does not matter for purposes of a review whether the arbitrator was right or wrong_ I shall accordingly limit myself to a discussion of the reviewable acts said to have been committed by the arbitrator.

P. The Primary Question and the Shifren Doctrine

[102] The primary question in terms of the May issues was whether Telcordia's interpretation relating to its software delivery obligations was correct or whether the interpretation advanced by Telkom was the correct one.

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[85] The same happened In *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A), concerning the constitution of a church.

Telcordia's case, as repeatedly stated. was that it had to deliver software which complied with the FSDs. Telkom's case, on the other hand, was that Telcordia had to deliver 'all' features and functionalities necessary for purposes of providing the two Flow-Thrus. Both parties relied on the terms of the Integrated Agreement for their different points of view.

[103] The arbitrator upheld Telcordia's interpretation while the high court upheld Telkom's interpretation. In doing so, the court ignored the fact that Telkom had, in its pleadings, disavowed the allegation that 'all' had to be delivered and that it was unable to articulate before the arbitrator exactly what had to be delivered - it advanced eight versions.

[104] Telcordia's case, simply put, was this. The Project Plan provided for the delivery by Telcordia of complete specifications (named FDDs in the Project Plan but called in practice, according to the finding of the arbitrator, FSDs) of the software that had to be delivered subsequently. In other words, the specifications were 'deliverables' - part of Telcordia's delivery duty. They did not form part of the Integrated Agreement because they did not exist for a reason, which was spelt out in the definition of 'specifications': specifications in Exhibit C were defined to be the 'requirement specifications', which Telcordia had to supply six months before the delivery date of the actual software, that fully described the capabilities of the software that had to be delivered. In particular, the agreement recorded that 'the parties understand and agree that [Telcordia's] Integrated Response [ie, the SOCs] to [the Request for Bid] is not a typical off-the-shelf offering and that Specifications for the Licenced Software [to be provided by Telcordia] shall be subject to mutual development and agreement by the Parties, and sign off by Telkom.'

[105] In other words, what was required by way of software delivery had to be developed and agreed to by the parties. According to annexure D to the Project Plan, Telkom had to pay substantial amounts for the FDDs. Because FDDs had to be developed in cooperation and agreement with Telkom in the course of performing the contract, FDDs (which were thus mutually developed and agreed upon during the course of the Integrated Agreement and were to. be delivered) did not amend the Integrated Agreement. They did not change the ultimate delivery obligation, which was to comply eventually with the SOCs. Since a set of FDDs was developed for each release, it had to follow that they would also determine when particular features and functionalities had to be delivered.

[106] The arbitrator understood this to be Telcordia's case where he stated that the FSDs were not a substitute for the contractual requirements 'but rather the means whereby they are met'. But the high court, although recognising that Telcordia alleged that it had tendered delivery of the software in terms of the Project Plan while at the same time alleging that it had tendered the software as described in the agreed FDDs, and which had been paid for by Telkom as such, failed to understand this.

[107] In the light of this it is not surprising that Telcordia did not in its pleadings rely on an amendment of the Integrated Agreement which had been effected by the FSDs. It is also not surprising that Telkom did not plead that the FSDs were impermissible amendments to the agreement. This explains why Telkom never argued before the arbitrator that *Shifren* prevented Telcordia from relying on the FSDs.[86] Even when Telkom launched the section 20

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[86] The one sentence at the dying moments of the argument before the arbitrator on which the high court relied did not say otherwise.

proceedings after the conclusion of the proceedings before the arbitrator, it did not raise *Shifren* in connection with the primary question. It raised it in relation to Telcordia's second amendment and later in relation to the London agreement.[87] This confirms the ir pression the arbitrator had, namely that Telkom's reliance on *Shifren* did not arise in relation to the primary question; and it effectively disposes of the high court's interpretation of the pleadings and its assessment of the course of the proceedings, namely that Telkom had raised *Shifren* in the present context.[88]

[108] It is no wonder that the arbitrator said, both in his award and in his memorandum, that *Shifren* did not arise in the context of the primary question and did not need to be considered for the purpose of his award. For the high court to have held that the arbitrator had ignored the *Shifren* rule by failing to consider Telkom's *Shifren* argument in this context is inexplicable. It was not the arbitrator who misconceived the issue; it was, with respect, the court.

[109] The high court found (contrary to the finding of the arbitrator) that one had to look to the Project Plan and the SOCs to determine the specific functionalities and features of the software to be delivered. For this finding the court relied - impermissibly - on parts of the contract that the parties by agreement did not place before the arbitrator. This is another indication of the fact that the court misconceived its function: it even dealt with the review as an appeal in the broad sense taking into account facts that were not before the lower tribunal.

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[87] This was the position as late as 27 August 2000.

[88] The best evidence of Telkom's understanding of the issues especially that *Shifren* does not arise in relation to the determination of the contractual baseline is Telkom's 'List of the Issues to be Decided' of 1 August 2002, the final day of the argument before the arbitrator.

[110] The arbitrator, in reaching his conclusion, had regard to the evidence of Telcordia's expert witness, Prof Bernstein, which was to the effect that the SOCs could not in themselves identify the specific features and funetionalities that had to be included in each individual release of customized software. This evidence the arbitrator used in order to give business efficacy to the agreement. The high court held that the evidence was inadmissible. I fail to see on what basis it could so have been held. It was expert evidence that was necessary for the arbitrator to construe the agreement by placing him as near as may be in the position of the parties to the agreement.[89]

[111] Furthermore, since Telkom had abandoned the argument that the SOCs identified the specific features and functionalities of the software that had to be delivered, it is difficult to appreciate how it can be said that the arbitrator committed a gross Irregularity by failing to accord to the SOCs a contractual meaning which neither party propounded. Telkom jettisoned this argument for good reason: it was common cause that the SOCs did not contain a description of the features and funetionalities of each software release; further that the specifications referred to in the Project Plan were those defined in Exhibit C; and in addition that these had to be mutually developed, delivered by specific dates and paid for on agreed dates. It was common cause that the SOCs Were not mutually developed nor were they intended to be, and, additionally, they were not deliverables - they were pre-existing documents. This explains why Telkom's case was that Telcordia had to deliver all features and funetionalities necessary, and not that the SOCs defined the specific software functionalities. But the 'all' argument also had a fatal flaw in the view of

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[89] Cf *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 614E-G.

the arbitrator because the Project Plan envisaged delivery of upgrades of software. No wonder the arbitrator had a problem with Telkom's case (he could never establish what its case about the FSDs was) and why Telkom as a last resort sought to attack the validity of the contract on the basis that it had no exigible content.

[112] I digress for a moment and deal with the essence of the arbitrator's reasoning. He accepted that the Project Plan had to identify the specific functionality and features to be included in each release. He found that neither the WBS nor the bar charts performed this function and that the only way in which the Project Plan could be read as identifying the specific functionality and feature of each release is if the 'specifications' were read into it. After developing the point he concluded that 'the parties must have intended that the necessary detailed and specific descriptions of those obligations should be found elsewhere'.[90]

[113] It is quite clear that the 'elsewhere' the arbitrator had in mind was the delivery obligation of 'specifications', ie, the FSDs. The high court was under the impression that the arbitrator had thereby referred to the moratorium agreement (discussed above in part G) which, according to it, amounted to an invalid variation of the Integrated Agreement. The court also held that FSDS had their origin in the moratorium agreement, something in conflict with the arbitrator's factual finding that they were not so derived.[91] (Some were developed as a result of the

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[90] Emphasis added.

[91] There may be some confusion in this regard. On the arbitrator's finding there had to be some or other non-*Shifren* agreement on the content of the FSDs and the content of the 12/00 FSDs may in that sense have been derived from the moratorium agreement.

moratorium agreement but that is beside the point since there had to be agreement about their content.) As early as 29 October 1999, it was Telcordia's stated. position that the FSDs defined the software that had to be delivered and that they were official Telcordia deliverables, which required sign-off by Telkom.[92] By December 1999, Telcordia had already delivered the 06/00 FSDs and during March 2000, Telkom had paid for them in full. The moratorium agreement was concluded thereafter, at the end of March 2000. There are two additional points. Telkom relied on the moratorium agreement as part of its defence to the claim (which raises the approbation/reprobation question) and, as the arbitrator explicitly stated, he had not made any findings in relation to the moratorium agreement. His statement that once Telkom had agreed in terms of the relevant FSDs what a particular release should contain, it was not open to it to complain that the same release did not contain something in addition, was entirely consistent and logical, especially in the light of his view that the FSDs had to be agreed to between the parties without thereby amending the Integrated Agreement.

[114] The arbitrator found as a fact that the parties jointly developed and agreed to the content of the FSDs; that they were delivered when the 'specifications' had to be delivered; and that Telkom paid the contract price for 'specifications' for them. The evidence about subsequent conduct was, as the arbitrator noted, in the circumstances admissible (see the discussion above). It was, accordingly, proper for the arbitrator to have had regard to 'the events which happened' in interpreting the Integrated Agreement. The high court, without considering the basis on which the

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[92] This disposes of the argument that reliance on the FSDs was a strategy which Telcordia dreamt up later.

arbitrator used the evidence, held that it was inadmissible. It erred.

[115] The foregoing also disposes of Telkom's submission that the arbitrator transgressed the parol evidence rule. This was not an issue foreshadowed in the review application. In any event, the basis of the argument was, once again, that the FSDs altered the terms of the Integrated Agreement, an argument that I have already dismissed. The submission furthermore conflates and confuses different matters; the integration rule (or parol evidence rule);[93] the rules relating to interpretation;[94] and the *Shifren* rule. The integration rule concerns agreements that *precede* the relevant written jural act.[95] They may not be proved because they are supposed to have been subsumed by or integrated into the written jural act.[96] The arbitrator did not once refer to evidence which could even remotely have been so classified.

[116] But, as the arbitrator noted, some of the December FSDs were not signed off by Telkom. I have already mentioned that according to the definition of 'specifications' they were not only subject to mutual development and agreement by the parties, but also required 'sign off' by Telkom.[97] This is the subject of another debate to which I shall turn. In the present setting, however, the fact that the FSDs were not signed off has no

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[93] Cf *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) at 26.

[94] *Cf Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 326.

[95] DT Zeffertt, AP Paizes, A St Q Skeen *The South African Law of Evidence* (2003) p 322.

[96] *Johnston v Leal* 1980 (3) SA 927 (A) at 943B-D.

[97] See also the provision In Exhibit F of the Integrated Agreement.

bearing on the meaning of the Integrated Agreement, especially as to what the baseline was. It could only mean that Telcordia should not have been paid for them, but Telkom, so the arbitrator held, had no explanation for having paid.[98] As I have said earlier, the interpretation issue was whether the 'specifications' were to be found in FSDs; and the compliance issue was whether, by having delivered the particular FSDs and by delivering the software described therein or tendering delivery, Telcordia had compiled with its contractual obligations.

Q. The Sign-Off Requirement

[117] The high court found that because the arbitrator had held that the 12/00 FSDs qualified as 'specifications', although they had not all been signed off by Telkom, he committed an irregularity in the interpretation of the contract; that he rewrote the contract; and that he Ignored the evidence about the absence of sign-off. All this, according to the court, meant that the arbitrator had misconceived the nature of the inquiry and his duties in connection therewith.

[118] The high court further found that the sign-off requirement in the definition of specifications 'probably' referred to the contractual requirement in the non-variation clause that amendments be in writing and signed by both parties, and *'probably'* required sign-off only by Telkom because the specifications would, in the nature thereof, be prepared by Telcordia for Telkom's acceptance. These provisional views, which are devoid of any merit, are further indications of the fact that the court conflated the interpretation and compliance issues.

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[98] The pleaded defence of payment under protest was according to the arbitrator not pursued.

[119] The high court also dealt with the absence of 'agreement' about the content of the 12/00 FSDs. It appears that the court held as a matter of fact that there was no agreement about their content, a factual finding in conflict with that of the arbitrator. The arbitrator's factual finding to the effect that there was agreement on the 12/00 FSDs is binding on the parties. I may add that although Telkom complained in its supplementary affidavit about the arbitrator's finding, it did not allege that the finding amounted to either misconduct or gross irregularity; that was reserved for the lack of any finding about sign-off.

[120] The high court's judgment in any event did not do justice to the findings of the arbitrator. The arbitrator did not 'ignore' the evidence about the absence of a formal sign-off; on the contrary, he repeatedly noted that the FSDs had not been signed off. The arbitrator also did not 'rewrite' the contract - he understood that signing off was required, and he never suggested otherwise.

[121] It is apparent that the arbitrator thought, rightly or wrongly, that having mutually developed and agreed on the contents of the FSDs, and having paid for them, the formal requirement of signing off was dispensed with by Telkom. This one can deduce from the arbitrator's reference (in another context) to the principle that acceptance of substitute performance does not fall foul of *Shifren*[99] and the lack of response by Telkom to the letter of 6 July 2000 written by Telcordia's solutions architect, Mr Barlso, who said that sign off was required as an acknowledgement of the receipt of the FSDs.

[122] The arbitrator may have been wrong but this does not mean that he has misconceived the nature of the inquiry or his duties, or that he acted irrationally. The statement by

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[99] See para 13 of this judgment.

Innes CJ quoted earlier has to be borne in mind, namely that the failure to deal with facts that go to the merits of a case is not an 'irregularity'.[100] Even if one assumes that the arbitrator had forgotten about the significance of the lack of signing off, his oversight is still not an irregularity. A factual issue was once again dressed up as a question of law and cross-dressed as a procedural Irregularity.[101]

R. The Disclaimers

[123] The FSDs contained disclaimers inserted by Telcordia. These were not all worded in identical terms but they stated in essence that the features contained in them represented Telcordia's 'current understanding of the functionality required to support this solution' and that they did not represent a 'commitment on behalf of Telcordia to implement the functionalities' since 'such commitments are made by formal contracts'.

[124] The arbitrator did not deal with the disclaimers in his award. This led to a finding by the high court that he had 'apparently ignored the issue' although the 'relevant facts were placed before him'; and this, in turn, meant that he had misconceived the whole nature of the inquiry. The disclaimers, in my judgment, had nothing to do with the interpretation of the Integrated Agreement and by 'ignoring' them the arbitrator could not have erred in his interpretation or committed a material error of law.

[125] The failure to have dealt with a particular factual sub-issue does not mean that the arbitrator misunderstood the nature of the inquiry. It also does not mean that the arbitrator ignored them. It is equally conceivable that he

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[100] *Doyle v Shenker & Co Ltd* 1915 AD 233 at 238.

[101] This is apparent from the way the founding affidavit was formulated.

thought that the issue was not worth pursuing in the light of some of his other findings, which I repeat: he found that the FSDs were deliverables; that they did not amend the Integrated Agreement; that they prescribed the scope of the software that had to be delivered; that they were mutually developed and agreed; and that they were paid for in full without error.

[126] What then is the value of a unilateral statement by Telcordia about the status of the FSDs, inserted without Telkom's consent (as pointed out by Telkom)? I would have thought that the answer is self evident: nothing. It follows that this attack has to fail.

S. Testing for SOC Compliance

[127] The Project Plan made provision for the testing of software for SOC compliance. As the arbitrator accepted, the Project Plan 'suggests' that testing had to take place release by release, If SOC testing had to be release by release, according to Telkom end the high court, Telcordia's argument concerning the FSDs would of necessity have been incorrect. The arbitrator, rightly or wrongly, did not agree.

[128] As Telkom accepted in its founding affidavit, the arbitrator held that testing for SOC compliance had to take place once everything had been delivered and not with each release. The high court also accepted that the arbitrator 'in effect' had made such a finding. This is an understatement.

[129] There is nothing to justify the conclusion that the arbitrator misconceived the nature of the inquiry. At most the arbitrator may have misconceived the importance of the testing provision in the Project Plan. He did not as the high court held (contrary to its 'in effect' finding) ignore the provision. He thought that the provision, which the court held was definitive of the whole issue, only 'suggested' the possibility but, in the context of the Integrated Agreement

as a whole, he must have come to the conclusion that what he called a suggestion could not have overridden the other considerations which he took into account in reaching his conclusion on the interpretation of the Integrated Agreement.

[130] Once again, by virtue of the nature of the inquiry before the high court, and before us, I do not wish to deal with either the. argument by Telcordia about the correctness or that of Telkom about the incorrectness of the arbitrator's conclusion - both are beside the point.

[131] This also applies to the debate surrounding the caveat in the bar chart. Evidence was led to put a perspective on Its meaning and Telcordia made much of this in support of its argument about the interpretation of the Integrated Agreement. The arbitrator noted the argument but did not deal with it. In order to bolster its argument that the arbitrator's interpretation of the Integrated Agreement was correct, Telcordia repeated the argument before the high court. The court did not agree with Telcordia, accepting instead an interpretation which was first mooted by Telkom in its replying affidavit in the review application. Importantly for present purposes, the court did not hold that the arbitrator had committed any reviewable act in this regard and it could in any event not have done so in view of the fact that Telkom did not attempt to make out such a case. The meaning of the caveat was thus yet another irrelevant side show in the review proceedings.

T. The London Agreement

[132] That disposes of the high court's decision and Telkom's attempt to review the award on the ground of the arbitrator's interpretation of the Integrated Agreement. I now turn to deal with the other review grounds, the first of which relates to the London agreement.

[133] Telkom did not pay the agreed US$ 23,3m for the 06/00 software shipment on due date as required by the Project Plan. Its ostensible reason was that the software did not comply with the Project Plan and had a number of critical gaps based on its understanding of Telcordia's delivery obligations. Eventually, and pursuant to the oral London agreement, Telkom paid 60 per cent of the invoice.

[134] Telcordia claimed, as a self-contained claim 'B', payment of the balance of 40 per cent based on the allegation that the software complied with the FSDs, that Telkom, took delivery of the software, and had not paid the full price. In addition, Telcordia claimed amounts that were payable in respect of this software shipment at later pay points.

[135] Telcordia did not rely on the London agreement in its original statement of claim. Telkom, on the other hand, in Its answering pleading, did so. Its defence to the claim for payment was that the 40 per cent balance would have been paid in December 2000 'on condition that rectification by Telcordia of the discrepancies [Telkom's problems with the 06/00 release] was verified by Telkom'. Rectification of the software, it was alleged, had to take place by means of the 12/00 release, which had to remedy the critical gaps, and had to be verified by means of a demonstration of the 12/00 release during November 2000. Importantly, Telkom did not allege that the November demonstration was a precondition for its accepting delivery of the 12/00 shipment; and Telkom did not allege (in the pleadings or in the repudiation correspondence) that it was entitled to reject delivery of the 12/00 software on this ground. Nor did it in the counterclaim allege any breach of the demonstration undertaking.

[136] Although the London agreement was not one of the May issues, the wide ranging evidence covered it to some extent. Towards the conclusion of the argument

before the arbitrator Telkom had second thoughts about the agreement and tentatively argued that the London agreement might not have been covered by the arbitration clause and that in any event it might have been in conflict with *Shifren*.

[137] An affidavit with supporting documents was filed by Telcordia just before the conclusion of argument setting out its version of the London agreement. The documents gave the arbitrator the impression that Telkom's version about the precondition for payment was implausible. He then told Telkom that if it wished to dispute Telcordia's version it should file affidavits to that effect. In response Telkom then flied the evidence of two Telkom employees, Messrs Morgan and September. Their statements tended to confirm the allegations contained in Telkom's pleadings. However, they did not state that a pre-delivery demonstration (or anything else) was a precondition for acceptance of delivery of the 12/00 software.[102]

[138] The next stage in the proceedings was the filing of the s 20 application in which Telkom argued, as foreshadowed, that the high court should decide whether the London agreement fell outside the scope of the arbitration agreement. The arbitrator pointed out that the point is probably bad. I agree. It is difficult to see how a party to arbitration can rely on an agreement; fight the case on that basis; ask the arbitrator to hear evidence on the issue; complain that he failed to give enough attention to it; and when the shoe pinches claim that the agreement falls outside the purview of the arbitration. This is just another instance of Telkom's inconsistency in the conduct of its

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[102] The later letter of 9 January 2001 on which Telkom relies also does not support the existence of a precondition. In fact, a request at that late stage of 'some means/evidence' of compliance before payment (not

case. Telkom also raised the question whether, in any event, the London agreement was in breach of the *Shifren* principle.

[139] In the review application Telkom performed another dizzying pirouette. In the first set of affidavits Telkom attacked the award on the ground that the alleged November demonstration precondition had not been fulfilled but when the arbitrator stated in his Memorandum that he had made no findings with regard to the London agreement, Telkom - in the supplementary founding affidavit - alleged for the first time that the London agreement amounted to a separate and independent compromise agreement, which was not in conflict with *Shifren* and which made acceptance of the 12/00 software subject to two suspensive conditions.

[140] Telkom's case on review was that the arbitrator committed a gross irregularity in the proceedings by deciding the issue that Telkom's failure to take delivery of the 12/00 software could constitute. a repudiation. without hearing the evidence of Morgan and September about the two suspensive conditions, something he undertook to do. The arbitrator's undertaking on which Telkom relied was not in the terms Telkom suggests. The arbitrator asked for affidavits dealing with the pleaded issue surrounding the London agreement, namely the preconditions to payment of the 40 per cent. If, he said, there was a serious dispute on this issue he would require cross-examination. As he noted in his memorandum, Telkom neither pleaded nor advanced any case to the effect that the London agreement was determinative of Telcordia's delivery obligations under the Integrated Agreement.

[141] The arbitrator kept his promise: he did not decide the issue pleaded although he expressed the prima facie

view that Telkom's version was not suppurted by the documents.[103] Expressing prima facie views on common cause documents is not improper and can by no stretch of the imagination be considered to be an irregularity.

[142] There is accordingly no basis for the allegation that the arbitrator had failed to afford Telkom a hearing on this matter, which was not before him and was only articulated, without proper supporting evidence, during the review proceedings. He was entitled to ignore any evidence by Morgan and September that dealt with issues not pleaded (assuming they gave such evidence).

U. The Section 20 Issue

[143] This brings me to the last ground of review with which i shall deal. It concerns the events surrounding Telkom's s 20 application. Section 20 of the Act is in these terms:

> 'Statement of case for opinion of court or counsel during arbitration proceedings.—
>
> (1) An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.
>
> (2) An opinion referred to in subsection (1) shall be final and not subject to appeal and shall be binding

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[103] His statement that Morgan did not refute allegations made in a letter by Telcordia to Morgan was clearly a reference to the fact that Morgan did not respond at the time, This follows from the fact that he was at this stage only having regard to documents and not to affidavits.

on the arbitration tribunal and on the parties to the reference.'

[144] Telkom asked the arbitrator to state a number of questions of law by means of a special case for the opinion of the court. The arbitrator refused and proceeded to finalise his award. Telkom then launched an application to the high court, for an order that the arbitrator state a case. Before the application could be heard the award had already been published by the ICC. Upset, Telkom sought to review the arbitrator on two further grounds. As mentioned earlier, the first was that he committed a gross irregularity and exceeded his powers by refusing to state a case; and secondly, that he prevented Telkom from itself securing the statement of a case.[104] The first ground was abandoned before us.

[145] It will be recalled that the primary question raised in the May issues concerned the interpretation of the Integrated Agreement. interpretation is usually regarded as a legal question but it is not necessarily so. It may be a mixed question of fact and law, as the present case illustrates.[105] The remaining May issue raised the applicability of *Shifren* in relation to the moratorium agreement (the alternative response in Telcordia's second amendment). This Issue could only have arisen if the arbitrator had found against Telcordia on the primary question. After pre-hearings, three weeks of oral evidence (plus forests of paper evidence), argument written and oral, and at the conclusion of the latter on 1 August 2002, Telkom, patently fearing an unfavourable decision,

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[104] Relying on *Czamikow v Roth, Schmidt and Co* [1922] 2 KB 478 (CA).

[105] Cf *Dorman Long Swan Hunter (Pty) Ltd Y Karibib Visserye Ltd* 1984 (2) SA 462 (C) 474E-F.

suggested that the arbitrator should state a case concerning the applicability of *Shifren* in relation to the moratorium and London agreements. The arbitrator refused because, as he said, these issues were alternative issues and they might never arise, depending on his conclusion on the primary question. He also informed the parties that he proposed to go ahead with writing the award as quickly as possible.

[146] Two weeks later, an 14 August, Telkom tried another tactic. It now asked the arbitrator to state, in addition to the *Shifren* point, the primary question for an opinion by the court and requested him to defer his award if he was not prepared to accede to their request. The arbitrator (after obtaining Telcordia's answer) responded on 27 August by not only raising a number of valid concerns about the request to state a ease but by stating that his award would be available in final draft form shortly after 9 September; that he would then submit the draft to the ICC for consideration pursuant to its art 27;[106] and that he would inform the ICC of Telkom's request and leave it to the ICC.

[147] Without responding to the letter due to an oversight, Telkom issued its s 20 application. The founding affidavit was sworn on 28 August and the arbitrator informed of the application on 30 August. Keeping his word, the arbitrator submitted his draft award to the ICC on 9 September and informed the ICC of Telkom's request. Eventually, on 27 September the award was signed and on the same date the arbitrator submitted a report to court setting out his reasons for having refused Telkom's request

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[106] Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the (International Court of Arbitration). The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.'

for a stated case. Apart from some general policy considerations he referred to the stage of the proceedings when the request was made; the incongruity in Telkom's stance; the evidence led; the wasted costs; the lateness of the requests; the close analogy between this instance and the *Midkon* case;[107] the importance of evidence for construing the Integrated Agreement; the fact that the s 20 option was not exercised within a reasonable time; and Telkom's changes of heart about the validity of the London agreement.

[148] In his report the arbitrator added that he did not accede to Telkom's request since it was a matter for the court to decide, implying that he preferred to leave the question of referral to the court. This implication, on which Telkom's submission about irrationality was based, is not understood because once the arbitrator had issued his award the court was precluded from ordering him to state a case for its opinion.

[149] The first question was whether the arbitrator in fact prevented Telkom from obtaining a court order. If he did, it would have amounted to an irregularity. On the facts as set out he did not. Telkom knew at the end of August that he was not going to delay the award. He gave them a timetable. According to existing South African law, as expressed in *Midkon*,[108] he had no duty to delay his award in order to enable Telkom to approach the court. Nobody prevented Telkom from asking in the notice of motion or thereafter for an interim order to delay the issuing of the award, which was the duty of the ICC and not of the arbitrator. This Telkom did not do.

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[107] *Govemment of the Republic of SA v Midkon (Pty) Ltd* 1984 (3) SA 552 (T).

[108] At 562E-G, 563E-G.

[150] There are further reasons why the award cannot be reviewed on the basis of 'irregularity' or irrationality. These require a discussion of the scope of s 20 and depend on whether Telkom had a 'right' under s 20 to approach the court, which right the arbitrator frustrated.

[151] The first matter I wish to address is the nature of the arbitrator's discretion. Eloff J, in *Kildrummy*,[109] sought to curtail the general and unrestricted discretion the section gives to the arbitrator. There is no reason, having regard to the wording of the section, for such an approach. Rules circumscribing the way any discretion has to be exercised are generally unacceptable. Eloff J sought to justify his approach with reference to a dictum by Denning MR in *Halfdan Grieg*.[110]

> 'When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law . . . as distinct from a point which is dependent on the special expertise of the arbitrator or umpire . . . The point of law should be clear cut and capable of being accurately stated as a point of law -

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[109] *Administrator, Transvaal v Kildrummy Holdings (Pry) Ltd* 1978 (2) SA 124 (T).

[110] *Halfdan Grieg & Co A/S v Sterling Coal and Navigation Corp* [1973] 2 All ER 1073 at 1077c-g.

> as distinct from the dressing up of a matter of fact as if it were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case - as distinct from a side issue of little importance.
>
> If those three requisites are satisfied, the arbitrator or umpire should state a case.

[152] The Master of the Rolls, it will be recalled from my discussion of *Anisminic*,[111] was a proponent of the view that all matters of law should fall within the sole domain of courts. The other judges who sat with Denning MR did not concur in this regard. Scarman LJ made it quite clear that the discretion is 'unqualified' (at 1083) and Megaw LJ was of the view that the exercise was not a matter of general principle but depended on the circumstances of the case (at 1080). Eloff J justified his adoption of the Denning test on the basis that our Legislature would have intended s 20 to have the meaning attached to a similar section by English courts. But as Preiss J mentioned in *Midkon*,[112] there is a vital distinction between our statute and the (now repealed) English statute. There is in any event no justification for presuming that our Legislature (past or present) Intended to give the meaning to words that foreign courts may have done, especially where the Denning test came after the passing of the Act.[113] Ultimately Eloff J relied on *Theron's* case,[114] which I have discussed earlier and all that I wish to

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[111] *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL).

[112] *Government of the Republic of SA v Midkon (Pty) Ltd* 1984 (3) SA 552 (T) at 562G-I.

[113] LC Steyn *Uitleg van Watte* 5 ed at 132.

[114] *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A).

say is that the passage relied on was put in its correct perspective by this Court and that it does not support him.[115] In other words, I hold that there is no obligation on an arbitrator to state a case if the requirements set out by Denning MR are present. They are important factors to consider but they are not definitive. By way of a metaphorical footnote: The Denning approach gave rise to legislative action and what he had done to arbitration law was soon undone by the adoption of the Arbitration Act of 1979.[116]

[153] If an arbitrator decides not to state a case, the aggrieved party may under s 20 approach the high court- The court must then determine whether or not the arbitrator had erred in the exercise of his discretion as happened in both *Kildrummy and Midkon*. If there is no fault to be found with the arbitrator's exercise of his discretion, the court cannot order him to state a case. As mentioned, Telkom accepts that there was nothing wrong with the arbitrator's reasoning and that his refusal to state a case was justifiable. Once that is the case, the s 20 application was doomed from the outset especially since Telkom did not in that application seek to impugn the arbitrator's decision.

[154] Moreover, s 20 can be used only if the legal question arises 'in the course of the arbitration, it is not intended to apply where the parties agree to put a particular question of law to the arbitrator. Any other interpretation of the section would defeat its purpose and 'it would be futile

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[115] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) para 19-21; *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 99-100.

[116] Michael Kerr 'The Arbitration Act 1979' (1980) 43 MLR 45.

ever to submit a question of law to an arbitrator.'[117] Its purpose, at the very least, is not to enable parties, who have agreed to refer a legal issue to an arbitrator to renege on their deal. They have in such a case chosen their decision-maker for the particular issue and they are bound by their choice. In this case, the primary question, as well as the validity of the moratorium agreement, was specifically referred to the arbitrator for his decision. To allow a party in these circumstances to utilise s 20 would frustrate the arbitration agreement. It is not against public policy to agree to the finality of an extra-curial decision on a legal issue especially where the review rights contained in s 33 remain available, enabling the courts to retain control over the fairness of the proceedings.'[118]

[155] Finally, a party does not have the right to have a hypothetical question stated because it does not in truth 'arise' in the arbitration proceedings. The arbitrator made it quite clear that the *Shifren* issue was at that stage hypothetical because it could only 'arise' once he had come to a conclusion on the primary interpretation question in favour of Telkom. In the event he concluded otherwise and the issue never arose.

[156] I therefore conclude that since Telkom had no right to approach the high court in the circumstances of the case the arbitrator did not infringe any of its rights when he, in the face of the s 20 application, proceeded to do what he said he would do.

V. Conclusion

[157] Cloete JA has dealt with the repudiation issue and I agree with his judgment, This means that the appeal has to

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[117] *In re King and Duveen* [1913] 2 KB 32 at 36 In a different context.

[118] Cf *Pioneer Shipping Ltd v BTP Tioxide Ltd* (1982] AC 724, 740

succeed with costs. Telcordia is in the circumstances of the case entitled to the costs of three counsel during all stages of the proceedings, including the petition for leave to appeal, which Telkom opposed,

W. The Order

[158] The following order is made:

(a) The appeal is upheld with costs, including those consequent on the employment of three counsel, which shall also be allowed in relation to the different stages of the application for leave to appeal.

(b) The order of the court a quo is set aside and in its stead the following order issues:

'The application is dismissed with costs, including the costs of three counsel.'

s/s
L T C HARMS
JUDGE OF APPEAL

CLOETE JA:

[159] The issues which remain for decision in this appeal are whether, as argued by Telkom, the arbitrator, in finding that Telkom had repudiated the Integrated Agreement so entitling Telcordia to cancel it, exceeded his authority or decided a question without evidence, thereby committing a gross irregularity. If this were to be the case, the dismissal of Telkom's counterclaim would also fall to be set aside.

[160] In the section of his award entitled 'Telcordia's delivery obligations' the arbitrator summarised Telcordia's argument as to its delivery obligations under the Integrated Agreement, and followed with a summary of Telkom's argument. In each instance, he also dealt with the parties'

respective contentions on repudiation. Reduced to the barest essentials Telcordia's argument was that its contractual obligations were to be found in the FSDs, whereas Telkom's argument was that Telcordia's contractual obligations were to be found in the SOCs. The arbitrator concluded that Telcordia's case was to be preferred and gave detailed reasons for this conclusion. In the next section of his award, entitled 'Termination of the Integrated Agreement: Telkom's Counterclaim', the arbitrator commenced by saying:

> '102, In their submissions to me both parties proceeded, quite correctly in my view, on the footing that the answer given to the question considered in the previous section of this Award would determine which party's termination of the Integrated Agreement was justified in law. Since, as I have found, Telcordia's tender of the December 2000 software release was in accordance with its contractual obligations, it must follow that Telkom's subsequent refusal to accept delivery of the software, or to go on with the contract, was a repudiation of the Integrated Agreement which Telcordia was entitled to accept as discharging the contract, by its letter dated 12 January 2001. It is clear law that the test for repudiation is an objective one, so that it makes no difference that Telkom may have considered that it was perfectly entitled to act as it did.'[119]

The arbitrator then said:

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[119] As authority for this latter proposition, the arbitrator referred to two decisions of this Court: *Metalmll (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pry) Ltd* 2001 (2) SA 284 (SCA).

'103. It follows from the above that Telkom's counterclaim, which depends for Its validity on the proposition that the IA [Integrated Agreement] was properly terminated by it in consequence of Telcordia's breach, must fail.'

Several sections of the award follow, none of which are relevant for present purposes, before the concluding section entitled 'Formal Award'. The formal award reads in part:

'1. That the Answer to Question 1.1 in the List of Issues[120] to be determined by this Award is that the contractual baseline for determining the specific features and functionality of the software to be delivered by Telcordia to Telkom in each of the various software releases provided for in the IA is the Feature Specification Descriptions (FSDs) applicable to such release- Question 1.2 does not require a separate answer.

2. That the Answer to Question 2.1 in the said List of Issues is that on the true construction of the IA and in the events which happened Telcordia was required to *deliver software in June and December 2000 which complied with the FSDs in respect of each* of those software releases. Question 2.2 does not require a separate answer, and Question 3, does not arise.

4. That by refusing to take delivery of *software which complied, to all material respects, with the FSDs applicable to* the December 2000 software release Telkom repudiated the IA.

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[120] The List of Issues, also referred to as the May Issues, is set out in part H of the judgment of Harms JA.

5. That Telkom's counterclaims are dismissed.' (Italics added.)

It is necessary to emphasise for reasons which will became apparent that at no point prior to this had the arbitrator discussed the question whether the December 2000 ('12/00') software release complied with the FSDs applicable to it. All that he had said, in passing, was the following:

> 'It is to be noted that Telkom was not contending, and has not subsequently contended, that what was delivered by the December 2000 release was not in compliance with the FSDs. . .'.

[161] Telkom submitted that the arbitrator exceeded his powers in making any finding in regard to repudiation, as this was not covered by the May issues. Indeed, Telkom went so far as to say that the arbitrators finding was a 'dramatic development as contemplated in those cases in South Africa[121] and in England[122] which hold that it is a gross irregularity for an arbitrator to decide a dispute on a point that has not been put to the parties and on which they have not been heard. It is true that the May issues as originally formulated involved questions of interpretation

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[121] *Kannenberg v Gird* 1966 (4) SA 173 (C) at 186G-187E; *Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria* 1969 (1) SA 496 (T) at 509C and 510E-511A; *Theron v Ring van Wellington, NG Sendingkerk In SA* 1976 (2) SA 1 (A) at 29C-F; *Steeledale Cladding (Pty) Ltd v Parsons* NO 2001 (2) SA 663 (D) at 672F-6731.

[122] *Societe Franca-Tunisienne D'Armement-Tunis v The Government of Ceylon (The "Massalla")* [1959] 2 Lloyd's Rep 1 (CA) at 13 and 17-18; *Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd* [1965] 1 Lloyd's Rep 597 (QBD) at 601-2; *Fox v Wellfair Ltd* [1981] 2 Lloyd's Rep 514 (CA) at 517, 520, 522 and 528-530; *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira")* [1984] 2 Lloyd's Rep 66 (CA) at 74-76.

of the Integrated Agreement and not performance of it. But the deponent to the replying affidavit delivered on behalf of Telkom in these proceedings said unequivocally:

> 'I admit that, during the course of the proceedings, the scope and focus of the issues widened and that, at the end of the May hearing, Telkom said that the Arbitrator should decide as many of the issues between the parties as could fairly be determined in the light of oral and documentary evidence presented during May.'

Indeed, by the end of the hearing in 2002, each party had requested the arbitrator to deal with its right to cancel on the basis of the evidence that had been placed before him. Telkom even sought judgment in respect of its counterclaim. The arbitrator's statement in para 102 of his award (quoted in the previous paragraph of this judgment) that the parties proceeded on the footing that his decision on Telcordia's delivery obligations would determine which party's termination of the Integrated Agreement was justified in law, is amply justified by the record, Far from being a 'dramatic event', the arbitrator did no more than what the parties had requested him to do.

[162] Telkom submitted that the arbitrator had nevertheless exceeded his authority, in that the question whether it had repudiated the Integrated Agreement could not fairly have been determined by the arbitrator on the evidence before him, because it might have been able to justify its conduct - which would not then have amounted to a repudiation - by showing that the 12/00 software release did not comply with the FSDs. The argument amounts to this: The arbitrator held that it had repudiated the Integrated Agreement by insisting that Telcordia perform in terms of its fallacious interpretation of the contract. But if the software tendered by Telcordia did not comply with the FSDs; that would have entitled it to refuse to receive the

software. Therefore if it can establish such non-compliance, its rejection of the software was justified. And If Its rejection was justified, it cannot amount to repudiation. The finding by the arbitrator that it had repudiated the Integrated Agreement was therefore premature and he exceeded his powers in making the finding at that stage of the arbitration. It must be borne in mind, as pointed out by Harms JA in para [89] of his judgment that it was within the power of the arbitrator to decide the scope of his mandate. That apart, there are at least three reasons why Telkom's contention must fail - two of fact, and one of law.

[163] First, as the arbitrator observed, it was never Telkom's case, either on the pleadings or during the 2002 hearing, that the 12/00 software release did not comply with the FSDs. Telkom sought in this court to argue the contrary. Its argument is unsustainable. So far as the pleadings are concerned, Telcordia alleged in its statement of claim that Telkom had repudiated the Integrated Agreement inter alia 'by refusing to take delivery of the December 2000 release notwithstanding that Telcordia tendered delivery of such release in accordance with the Project Plan and that Telkom is obliged to take delivery thereof. These allegations were simply 'disputed' by Telkom in its plea; but that bald denial was wholly inadequate to support a case that Telkom was entitled to reject the software tendered because it did not comply with the FSDs. A defendant who wishes to raise the *exceptio non adimpleti contractus* on the basis of an incomplete tender must particularise in the plea in what respects performance was defective and will ordinarily have to give evidence on this aspect first (although the overall onus to disprove the existence of the defects will remain on the plaintiff).[123] The reason is obvious: a plaintiff cannot be

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[123] *HA Millard and Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 332G-H.

expected to prove a negative where the complaints of the defendant are unknown. Furthermore, when Telcordia requested further particulars from Telkom as to the respects in which Telkom alleged that the software tendered in December 2000 failed to comply with Telcordia's delivery obligations, Telkom replied that Telcordia should have regard to the SOCs and the fact that the December release was required to contain all features and functionality necessary to achieve Non-Voice Flow-Thru. It was not even suggested that there was any discrepancy between the software tendered and the FSDs. In other words, Telkom's pleaded case involved a comparison of the FSDs with the SOCs and not a comparison between the software and the requirements of the FSDs.

[164] So far as the hearing is concerned, Telkom's counsel made it clear that Telkom did not follow the acceptance test procedure in respect of the software tendered, which is the procedure for which the Integrated Agreement provides to identify and remedy shortcomings in the software, because it was known that the software contained 'gaps' and would accordingly not comply with Telkom's interpretation of Telcordia's obligations. Telkom's counsel at no time suggested that Telkom was entitled to reject the 12/00 software release because it did not comply with the FSDs.

[165] The second reason why Telkom's argument that it could have justified its conduct by showing that the 12/00 software release did not comply with the FSDs must fail, is this. Telcordia was entitled to remedy any shortcomings during the subsequent testing process. The testing process could take place only over a period of time and only within Telkom's own systems and Telcordia was entitled and obliged through updates to rectify any problems. It was simply not open to Telkom to reject the software release on the basis that it did not comply with the FSDs, because the

contract contemplated that this could well be the case and it allowed Telcordia to cure any defects in the software within the time allowed for performance. The corollary to Telcordia% right is that Telkom was not entitled to refuse to accept the December software when it was tendered even if it did not fully comply with the FSDs - it was obliged to receive it and proceed with the testing process.

[166] In any event Telkom's argument is unsound in law. Telkom prayed in aid the *falsa causa non nocet* principle laid down in cases such as *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA). Those cases hold that: 'Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given'.[124] But this principle has no application in a case such as the present, where it is the other party who has cancelled the contract. In such a case, the party who repudiated cannot put the clock back and undo the valid cancellation by relying on a ground that he legitimately could have, but did not, advance, in substitution for the ground that he did advance and which resulted in the cancellation of the contract. Once cancelled, the contract is irrevocably at an end. The rule exists for the protection of an innocent party and does not enure to the benefit of a party guilty of a breach of contract: it does not entitle the latter to claim that, since it could have done something similar without breaching the contract, its breach had no adverse legal consequences.

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[124] *Putco* at 832C-D.

[167] Finally, Telkom submitted that the italicised part of para 4 of the arbitrator's award (quoted in para [160] above) constituted a finding that the 12/00 software release in fact complied with the FSDs applicable to it; and that as there had been no evidence on this point, the arbitrator's finding that it had repudiated the Integrated Agreement fell to be set aside on review. Paragraph 4 of the award must, however, be read in context. The fundamental issue between the parties was, as I have said, whether Telcordia's contractual obligations were to be detonated with reference to the FSDs (Telcordia's case) or the SOCs (Telkom's case). The arbitrator, in his detailed reasons which preceded the formal award, decided this issue in favour of Telcordia and embodied that decision in paras 1 and 2 of his formal award (also quoted in para [160] above). Once he had made this decision, and since it was not pleaded or argued by Telkom that the 12/00 software release did not in fact comply with the FSDs (as the arbitrator expressly noted), It followed that Telkom's rejection of the 12/00 software release was a repudiation of the Integrated Agreement. That was the finding embodied in para 4 of the arbitrator's formal award. In that paragraph the arbitrator did not intend additionally to decide that the December software release as a matter of fact accorded with the FSDs nor must that paragraph be interpreted as embodying such a finding; the arbitrator clearly intended merely to articulate the conclusion already reached by him, namely, that Telkom had repudiated the Integrated Agreement by rejecting software developed in accordance with the FSDs (as opposed to the SOCs). In the absence of a challenge by Telkom that the software did not in fact comply with the FSDs, it is not surprising that the arbitrator expressed himself as he did. If Telkom subsequently seeks to make out a case, in relation to the remaining issues relating to quantum not decided by the arbitrator's interim award, that the 12/00 software release did not comply in fact with the

FSDs applicable to it, it is entitled to do so - but its right to do so does not affect in any way the arbitrator's conclusion that it repudiated the Integrated Agreement.

[168] I therefore conclude that Telkom's attack on the arbitrator's finding that it repudiated the Integrated Agreement, is without merit. It follows that the arbitrator's dismissal of Telkom's counterclaim must stand. On the other issues raised in the appeal I respectfully agree with the reasoning and conclusions reached by Harms JA, and concur in the order made.

s/s
T D CLOETE
JUDGE OF APPEAL

Concur: Conradie JA
Lewis JA
Ponnan JA